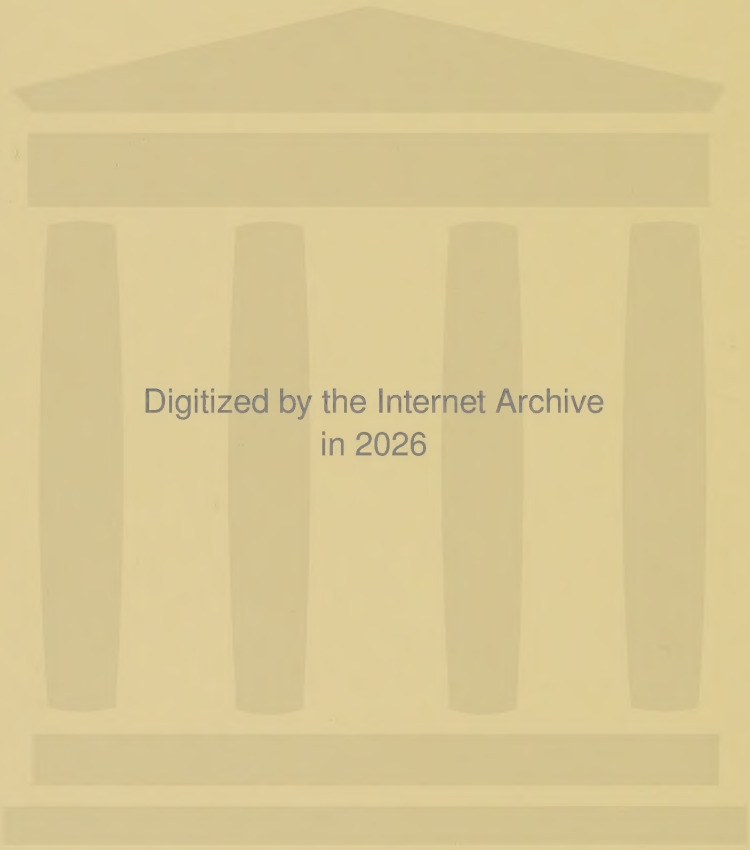
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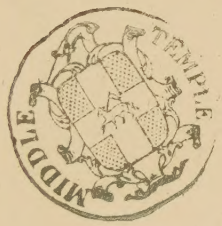

THE PRINCIPLES

OF THE

LAW OF EVIDENCE.

With Elementary Rules

FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

By W. M. BEST, A.M., LL.B.

EIGHTH EDITION.

WITH A COLLECTION OF LEADING PROPOSITIONS

By J. M. LELY, Esq.

BARRISTER-AT-LAW,

EDITOR OF "WOODFALL'S LAW OF LANDLORD AND TENANT," ETC.

With Notes to American and Canadian Cases.

By CHARLES F. CHAMBERLAYNE, Esq., of the Boston Bar.

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PREFACE

TO THE EIGHTH EDITION.

SINCE the Seventh Edition of this book was published some ten years ago, the Criminal Law Amendment Act, 1885, and the Oaths Act, 1888, have materially affected the statute law of its subject. In the region of case law, where little of importance has been decided, Mr. Best's principle of selection—so great a feature of the work—has been carefully followed. Publication was delayed for a few months in order to incorporate the Law of Criminal Evidence Bill if it should be passed, and a short additional chapter has been written upon this curious branch of legislation, in respect of which the Colony of Victoria has lately taken a step far in advance of the Mother Country. The Law of Criminal Evidence Bill, it may be observed, is not one of the measures which can be taken up by Parliament in its adjourned Session just commencing, inasmuch as the order for its second reading was discharged prior to the adjournment.

Some little space has been saved by the omission of Bentham's fantastic "thermometer of persuasion" (one of the few follies of a very wise man) and of the exposure of its fallacy by M. Dumont, his French translator (see s. 71), while the passage respecting Chinese substitutes in criminal

cases has been robbed of its illustration in the original Chinese characters (see s. 571); but in these and all other cases of compression, the numbering of Mr. Best's sections has, as in the former edition, been carefully preserved.

The main feature of the present edition is the introduction of valuable and copious American Notes "with a range of citations brought down to date" and having "the Canadian, New Brunswick and Nova Scotia cases added," by Mr. Charles F. Chamberlayne, of the Boston Bar. For these Mr. Chamberlayne is solely responsible, while the English editor is solely responsible for the text, though it should be added that a transatlantic revision of proofs was specially arranged for, and that the English editor took no part in this revision, but merely endeavoured to make it as light as possible by more than ordinarily careful preparation of his manuscript. Although the book has been printed in America, the English spelling is retained throughout.

This being the first English law book internationally published to reap the benefit of the recent American Copyright Act, the Editor takes the opportunity of congratulating the legal writers of the English speaking countries upon the passing of that Act, and of expressing the hope that its principle may be still further extended before very long, by the abolition of the requirement of transatlantic printing as a condition precedent to transatlantic copyright.

J. M. LELY.

THE TEMPLE, *November 1st*, 1893.

PREFACE TO THE SEVENTH EDITION.

The learned Treatise of the late Mr. Best on the Law of Evidence, first published in 1849, has long occupied a distinctive position amongst English law books for a preference of principles to details, for apt illustrations, and comparative treatment of foreign systems. The Second, Third, and Fourth Editions were the work of the Author, and were published in the years 1855, 1860, and 1866, respectively; the Fifth and Sixth were brought out after the Author's death by Mr. J. A. Russell, Q.C., in the years 1870 and 1875.

The present Editor, while not interfering with the general arrangement of the book, has made considerable alterations in points of detail. The rather too frequent illustrations have been lessened in number; the less important Statutes have been frequently abridged instead of being printed at length, and the longer notes have been cut down or thrown into the text.

The statutory law of evidence is contained in some 800 statutes; but of these, comparatively few relate to evidence alone. A table of such statutes will now be found at the end of the second Chapter of the First Book.

A new "Fifth Book" contains a collection of the leading propositions of the law of evidence, which will, it is hoped, be of use, not only to the general reader, but to the actual practitioner, in getting up evidence and advising thereon.

The Editor most thankfully acknowledges his obligations to the exhaustive work of Mr. Pitt-Taylor, and the well-known Digest of Mr. Justice Stephen.

The Temple,
December, 1882.

ORIGINAL PREFACE.

The common law system of evidence, in its actual state the growth of the last two centuries, must ever claim the highest respect and admiration as a whole, however particular portions of it may be justly or unjustly condemned. Now the design of the present Work, is not to add to the *practical* treatises by which the subject has been illustrated, but to examine the *principles* on which its rules are founded, tracing them to their sources, and showing their connexion with each other. To this are annexed a sketch of the practice relative to the offering and receiving evidence at trials, and a few elementary precepts, founded chiefly on those of Quintilian, for the guidance of young practitioners in interrogating witnesses.

Throughout the book, particularly in the Introduction when treating of judicial evidence in the abstract, much assistance has been derived from the Roman law, the civilians, and other foreign writers; and especially from the able work published by M. Bonnier, at Paris, in 1843, entitled "Traité Théorique et Pratique des Preuves en Droit Civil et en Droit Criminel." Large use has also been made of "Bentham's Rationale of Judicial Evidence," in five volumes, London, 1827; in which the general principles of evidence are ably discussed, and often happily illustrated. That book should, however, be read with caution, as it embodies several essentially mistaken views relative to the

nature of *judicial* evidence, and which may be traced to overlooking the characteristic features whereby it is distinguished from other kinds of evidence. Some of these errors will be pointed out in the Introduction.

The Author begs to express his grateful acknowledgments for the suggestions from many friends. The Index has been compiled by Mr. H. Macnamara, of the Inner Temple.

CHANCERY LANE,
July, 1849.

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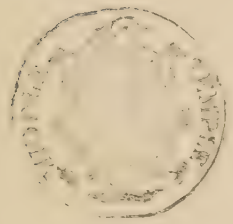
THE

PRINCIPLES OF EVIDENCE.



INTRODUCTION.

PART I.

EVIDENCE AND PROOF IN GENERAL.

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§ 1. LAW has been correctly defined as a rule of human action, prescribed and promulgated by sovereign authority, and enforced by sanction of reward or punishment. But although human actions are the subject-matter about which law is conversant, they are not essen-

tial to its existence; for the rule is the same, whether its application is called forth or not. "If you commit murder or steal you shall be punished;" "if you buy a man's lands or goods you shall pay for them," — would hold true as rules of law, though no murder or theft were ever committed, and though every debt contracted were faithfully discharged. The rule continues in abstraction and theory, until an act is done on which it can attach, and assume, as it were, a body and shape. The maxim of jurists and lawyers, "ex facto oritur jus," and such like, must be understood in this sense; and the duty of judicial tribunals, consequently, embraces the investigation of doubtful or disputed facts, as well as the application of the principles of jurisprudence to such as are ascertained (*a*).

§ 2. Facts which come in question in courts of justice are inquired into and determined in precisely the same way, as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules, to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation. And this is strictly analogous to the relation between natural and municipal law, of which it has been well observed: "There are in nature certain fountains of justice, whence all civil laws are derived but as streams; and like as waters do take tinctures and tastes from the soils through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountains" (*b*). As therefore the study of natural law precedes that of municipal, so an inquiry into the natural resources of the human mind for the investigation of truth should precede an examination of the artificial means devised for its assistance; and the present Introduction will accordingly consist of two Parts devoted to these respective subjects.

§ 3. The human understanding may be considered in three points of view; namely, with respect to the sources of our ideas; the objects about which the human mind is conversant; and the intensity of our persuasions as to the truth or falsehood of facts or propositions.

§ 4. The best metaphysicians trace all our ideas to the sources of sensation or of reflection (*c*). There appear to be two kinds of

(*a*) It has been already stated in the Preface, and may as well be here repeated, that this work has been at some points abridged and enlarged in the present edition, but that the arrangement of the author has been entirely preserved.

(*b*) Bacon on the Advancement of Learning, bk. 2.

(*c*) Locke on the Human Understanding, bk. 2, ch. 1, and passim.

sensation (*d*): 1. The internal sense, — the intuitive perception of our own existence and of what is actually passing in our minds. Of all forms of knowledge or persuasion this is the clearest and most indubitable; and it is the basis of every other. Descartes and Locke, however different their systems in other respects, agree in this. "Cogito, ergo sum," is the celebrated maxim of the former (*e*): "If I doubt of all other things," says the latter (*f*), "that very doubt makes me perceive my own existence, and will not suffer me to doubt of that." "The scepticks," observes Sir Thomas Brown (*g*), "that affirmed they knew nothing, even in that opinion confute themselves, and thought they knew more than all the world besides." And according to a scholastic maxim, "Nihil est in intellectu, quod non fuerit in sensu" (*h*), to which Leibnitz sagaciously adds, "nisi ipse intellectus" (*i*). 2. The external sense, — the faculty whereby the perception of the presence of external objects is conveyed to the mind through our outward senses (*k*). All our other ideas are formed from the above by the operations of "reflection" (*l*); which may be defined, that faculty through which the mind is supplied with ideas by any sort of act or operation of its own, either on ideas received directly through the senses, or on other ideas, either immediately or mediately traceable to ideas so received.

§ 5. The human mind is conversant about two classes of objects (*m*): 1. The relations between its ideas (*n*). Under this head come mathematical and such like truths; where it is obvious that the relations of our ideas to each other may be true, although there be nothing without the mind, corresponding to the ideas within it. The properties of an equilateral triangle or circle, for instance, are equally indisputable, whether a perfect equilateral triangle or perfect circle can be found in the universe or not (*o*); and astronomers investigate the curves which bodies would describe, if acted on by forces, which, so far as we are aware, have no patterns in nature. 2. Real existences; *i. e.*, objects existing without the mind, corresponding to ideas within it (*p*).

§ 6. With regard to intensity of persuasion; the faculties of the human mind are comprehended in the genera, knowledge and judg-

(*d*) Bonnier, Traité des Preuves, §§ 6 and 7, 2nd Ed. Locke *in loc. cit.* § 4, uses "internal sense" to signify "reflection."

(*e*) Principia Philosophiæ, pars 1, n. 7.

(*f*) Locke on the Human Understanding, bk. 4, ch. 9, § 3.

(*g*) Religio Medici, sect. 55.

(*h*) Encyclop. Britan. 1st Dissertation, pp. 113, 114.

(*i*) See his works, vol. 5, p. 359, Genev. 1768.

(*k*) Locke, bk. 2, ch. 1; Bonnier, Traité des Preuves, § 8, 2nd Ed.

(*l*) Locke, bk. 2, ch. 1.

(*m*) *Id.* bk. 4, ch. 1.

(*n*) *Id.* bk. 4, ch. 1, §§ 4, 5, 6.

(*o*) *Id.* bk. 4, ch. 4, § 6; De Morgan on Probabilities, p. 9.

(*p*) Locke, bk. 4, ch. 1, § 7.

ment (*q*). 1. By "knowledge," strictly speaking, is meant an actual perception of the agreement or disagreement of any of our ideas (*r*); and it is only to such a perception that the term "certainty" is properly applicable (*s*). Knowledge is *intuitive* when this agreement or disagreement is perceived immediately, by comparison of the ideas themselves: *demonstrative*, when it is only perceived mediately; *i. e.*, when it is deduced from a comparison of each, with intervening ideas which have a constant and immutable connection with them, as in the case of mathematical truths of which the mind has taken in the proofs. And, lastly, when, through the agency of our senses, we obtain a perception of the existence of external objects, our knowledge is said to be *sensitive* (*t*). But *knowledge* and *certainty* are constantly used in a secondary sense, which it is important not to overlook; viz., as synonymous with settled belief or reasonable conviction: as when we say that such a one received stolen goods *knowing* them to have been stolen; or that we are *certain*, or *morally certain*, of the existence of such a fact, &c. (*u*).

§ 7. 2. "Judgment," the other faculty of the mind, though inferior to knowledge in respect of intensity of persuasion, plays quite as important a part in human speculation and action, and, as connected with jurisprudence, demands our attention even more. It is the faculty by which our minds take ideas to agree or disagree, facts or propositions to be true or false, by the aid of intervening ideas whose connection with them is either not constant and immutable, or is not perceived to be so (*x*). The foundation of this is the *probability* or likelihood of that agreement or disagreement, of that truth or falsehood, deduced or *presumed* from its conformity or repugnancy to our knowledge, observation, and experience (*y*). Judgment is often based on the testimony of others, vouching their observation or experience (*z*); but this is clearly a branch of the former, as our belief in such cases rests on a presumption of the accuracy and veracity of the narrators.

§ 8. Actual knowledge and certainty extending a comparatively little way, men are compelled to resort to judgment and to act on probability, in by far the greater number of their speculations, as well as in the transactions of life, both ordinary and extraordinary, trivial

(*q*) Locke, bk. 4, ch. 14, § 4, and ch. 1, § 7.
(*r*) *Id.* bk. 4, ch. 1, § 2.
(*s*) *Id.* bk. 4, ch. 4, §§ 7, 18.
(*t*) *Id.* bk. 4, cc. 2 and 11.
(*u*) Pufendorf, Jus Nat. et Gent. lib. 1, cap. 2, § 11; Butler's Analogy of Religion, Introduction.
(*x*) Locke, bk. 4, ch. 15, § 1, and ch. 14, § 3.
(*y*) *Id.* ch. 15, §§ 3 and 4; ch. 14, § 4; Butler's Analogy of Religion, Introduction.
(*z*) Locke, bk. 4, ch. 15, § 4.

and important (*a*). The faculty of judgment is conversant not only about matters of fact, which, falling under the observation of our senses, are capable of being proved by human testimony, but also about the operations of nature, and other things beyond the discovery of our senses (*b*); and it thus embraces the enormous class of subjects investigated by analogy and induction (*c*). But here it is important to remark, that on the same matter one man may have knowledge and certainty, while another has only judgment and probability; as when a man, either from ignorance of mathematical principles or disinclination to go through the proofs, receives a mathematical truth on the testimony of one who comprehends it; in this case he has only got moral evidence of that truth, while his informant has demonstrative proof (*d*).

§ 9. Another great distinction between knowledge and judgment remains to be pointed out. The former is, as we have seen, reducible to three kinds (*e*); but to classify the degrees of persuasion resulting from judgment is wholly beyond human power; for the extent to which facts or propositions may be in conformity with our antecedent knowledge, observation, or experience, necessarily varies ad infinitum. An attempt has been made to express some of the shades of judgment by the terms assurance, confidence, confident belief, belief, conjecture, guess, doubt, distrust, disbelief, &c. (*f*).

§ 10. The word PROOF seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition (*g*); and as truths differ, the proofs adapted to them differ also (*h*). Thus the proofs of a mathematical problem or theorem are the intermediate ideas which form the links in the chain of demonstration; the proofs of anything established by induction are the facts from which it is inferred, &c.; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. "Proof" is also applied to the conviction generated in the mind by proof properly so called (*i*).

(*a*) Locke, ch. 14, § 1; Butler's Analogy of Religion, Introduction; 3 Bentham's Judicial Evidence, 351; Gilb. Ev. 3, 4, 4th Ed.

(*b*) Locke, bk. 4, ch. 16, §§ 5 and 12.

(*c*) *Id.* § 12, and Bonnier, Traité des Preuves, §§ 9 *et seq.*, 2nd Ed.

(*d*) Locke, bk. 4, ch. 15, § 1; and ch. 14, § 3; 1 Greenl. Ev. § 1, n. (1), 7th Ed.

(*e*) *Suprà*, § 6.

(*f*) Locke, bk. 4, ch. 16, §§ 6–9.

(*g*) Domat, Les Lois Civiles dans leur Ordre Naturel, part. 1, liv. 3, tit. 6; Bonnier, Traité des Preuves, § 5, 2nd Ed.

(*h*) Domat, *in loc. cit.*

(*i*) Matthæus de Probationibus, c. 1, n. 1; Huberus, Prælectiones Juris Civilis, lib. 22, tit. 3, n. 2; 1 Greenl. Ev. § 1, 7th Ed.

§ 11. The word EVIDENCE[1] signifies, in its original sense, the state of being evident; *i. e.*, plain, apparent, or notorious (*k*). But by an almost peculiar inflection of our language (*l*), it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law-books, and will be used throughout this work. Evidence, thus understood, has been well defined, — any matter of fact, the effect, tendency, or design of which is, to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact (*m*). The fact sought to be proved is termed the "principal fact;" the fact which tends to establish it, "the evidentiary fact" (*n*). When the chain consists of more than two parts, the intermediate links are principal facts with respect to those below, and evidentiary facts with respect to those above them. Such we propose to call "subalternate" principal and evidentiary facts.

§ 12. Confining ourselves henceforward to *truths of fact*, — the proper object of the present treatise, — we shall first direct attention to some divisions of them, which, as connected with jurisprudence especially, it will be convenient to bear in mind. In the first place, then, facts are either *physical* or *psychological* (*o*). By "physical facts" are meant, such as either have their seat in some inanimate being, or if in one that is animate, then not by virtue of the qualities which constitute it such; while "psychological facts" are those which have their seat in an animate being, by virtue of the qualities by which it is constituted animate. Thus, the existence of visible objects, the outward acts of intelligent agents, the res gestæ of a lawsuit, &c., range themselves under the former class: while to the latter belong such as only exist in the mind of an individual; as, for instance, the sensations or recollections of which he is conscious, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts, &c. Psychological facts are obviously incapable of direct proof by the testimony

(*k*) Johns. Dict. The Latin "evidentia," and the French "évidence," are commonly restricted by foreign jurists to those cases where conviction is produced by the testimony of our senses: See Quintilian, Inst. Orat. lib. 6, c. 2; Calvin, Lexic. Jurid.; Steph. Thesaur. Ling. Lat.; Domat, Lois Civiles, part. 1, liv. 3, tit. 6; Bonnier, Traité des Preuves, §§ 6, 8, 9, 82, &c., 2nd Ed. All relating to evidence, as the term is used in English law, is treated of by the civilians and canonists under the head "probatio," and by the French writers under that of "preuve."

(*l*) It has the same meaning in Norman-French; see int. al. T. 18 Edw. II. 614, tit. Replegg.; 9 Edw. III. 5, 6, pl. 11.

(*m*) 1 Benth. Jud. Ev. 17. "Evidence," Evidentia, signifies generally any proof, be it testimony of men, records, or writings: Cowel's Interpreter; and Les Termes de la Ley. See Co. Litt. 283 a.

(*n*) 1 Benth. Jud. Ev. 18.

(*o*) *Id.* 45.

[1] For a statement of the American law, see p. 19.

of witnesses: their existence can only be ascertained either by confession of the party whose mind is their seat (*p*),— "index animi sermo" (*q*),— or by presumptive inference from physical facts (*r*).

§ 13. There are two other divisions of facts which deserve to be noted. One is, that they are either *events* or *states of things* (*s*). By an "event" is meant some motion or change, considered as having come about either in the course of nature, or through the agency of human will; in which latter case it is called "an act," or "an action." The fall of a tree is "an event," the existence of the tree is "a state of things;" but both are alike "facts" (*t*). The remaining division of facts is into *positive* or *affirmative*, and *negative* (*u*): a distinction which, unlike both the former, does not belong to the nature of the facts themselves, but to that of the discourse which we employ in speaking of them (*x*). The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact. But the only really existing facts are positive ones, — for a negative fact is nothing more than the non-existence of a positive fact; and the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact (*y*).

§ 14. Our persuasion of the existence or non-existence of facts has its source, or efficient cause, either in the operation of our own perceptive or intellectual faculties, or in the operation of the like faculties on the part of others, evidenced to us either by discourse or deportment. The former of these may be called evidence ab intrà; the latter evidence ab extrà (*z*). The immense part which evidence ab extrà bears in forensic procedure, as well as in almost everything else, makes it advisable that we should consider, somewhat at large, the grounds of belief in human testimony, and the dangers to be avoided when dealing with it.

§ 15. The existence of a strong tendency in the human mind to accept as true what has been related by others is universally admitted, and is confirmed by every day's observation; and it may be laid down as equally certain, that one cause of this tendency is our experience of the great preponderance of truth over falsehood, in human testimony taken as a whole. But whether this is the *sole* cause has given rise to difference of opinion. Writers on natural law describe man as endowed by nature with a sort of moral instinct, which prompts him

(*p*) Mascardus de Probationibus, Concl. 309; 1 Benth. Jud. Ev. 82, 145; 3 *Id.* 6.
(*q*) 5 Co. 118 b.
(*r*) Mascard. de Prob. Concl. 94; 1 Benth. Jud. Ev. 82, 145; 3 *Id.* 6.
(*s*) 1 Benth. Jud. Ev. 47.
(*t*) 1 Benth. Jud. Ev. 48.
(*u*) *Id.* 49.
(*x*) *Id.*
(*y*) *Id.* 49, 50.
(*z*) *Id.* 51, 52.

to act in certain cases where vigor and expedition are required, and where the faculties of reason and reflection are either immatured, or, if matured, would be too slow (*a*); and most authors think that a tendency to believe the statements of others is to be found among the operations of this instinct. Man, they argue, is so constituted that the knowledge which he can acquire through his personal experience is necessarily very limited, and unless by some effective provision of nature he were enabled, and indeed compelled, to avail himself of the knowledge and experience of others, the world could neither be governed nor improved. The instinctive character of the tendency in question, they say, appears from the undoubted fact that it is immeasurably strongest in childhood, and diminishes when experience has made us acquainted with falsehood and deception (*b*). Others, however, deny all this (*c*); and it has been urged that the implicit belief so observable in children is owing to their experience being all, or nearly all, on one side; namely, in favour of the truth of what they hear (*d*).[1]

§ 16. However this may be, it is certain that the enunciation of truth and the abstinence from *wilful* falsehood, among men in their intercourse with each other, are secured by three guarantees or sanctions, — the *natural* sanction, the *moral* or *popular* sanction, and the *religious* sanction (*e*). And, first, of the *natural* sanction. Mutual confidence between man and man being indispensable to the acquisition of knowledge, the happiness of our race, and indeed to the very existence of society, the great Creator has planted the springs of truth very deep in the human breast. According to Bentham, the natural sanction is altogether physical in its character, arising out of the love of ease, — memory being prompter than invention (*f*). "To relate incidents as they have really happened," he says (*g*), "is the work of the memory; to relate them otherwise than as they have really happened, is the work of the invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work. The ideas

(*a*) Burlamaqui, Principes du Droit de la Nature et des Gens, pt. 2, ch. 3.

(*b*) 1 Greenl. Ev. § 7, 7th Ed., and the authorities there cited.

(*c*) 1 Benth. Jud. Ev. 127–130; Paley's Moral and Political Philosophy, bk. 1, ch. 5.

(*d*) 1 Benth. Jud. Ev. 129, 130.

(*e*) *Id.* 198; 5 *Id.* 635, 636. See Bonnier, Traité des Preuves, §§ 220, 221, 222, 2nd Ed. For the reasons stated in the text, we have adopted the phrase "*natural* sanction," used by Bonnier, in preference to "*physical* sanction," used by Bentham. The *legal* or *political* sanction of truth, and *oaths*, which are only an application of the religious sanction, being both artificial in their nature, will be more properly considered in the next Part.

(*f*) 2 Benth. Jud. Ev. 2.

(*g*) 1 *Id.* 202, 203. See also 1 Stark. Ev. 14, 3rd Ed. & *Id.* 20, 4th Ed.

[1] For a further statement see 1 Greenl. Evid. §§ 7–12.

presented by the memory present themselves in the first instance, and as it were of their own accord; the ideas presented by the invention, by the imagination, do not present themselves without labour and exertion. In the first instance come the true facts presented by the memory, which facts must be put aside: they are constantly presenting themselves, and as constantly must the door be shut against them. The false facts, for which the imagination is drawn upon, are not to be got at without effort: not only so, but if, in the search made after them, any at all present themselves, different ones will present themselves for the same place: to the labour of investigation is thus added the labour of selection." It is, however, very doubtful whether this, although true as far as it goes, embraces the full extent of the natural sanction. Bonnier, in his Traité des Preuves (*h*), severely attacks the passages just quoted, and says that the natural sanction for the veracity of witnesses is to be found in a certain powerful feeling in the human mind, which impels man to speak the truth, and makes him do violence to himself whenever he betrays it; that the true and the just are two poles towards which the human mind, when uncorrupted, continually points. And somewhat similar language is used by Lord Bacon (*i*). In another part of the same work, however (*k*), Bentham mentions the *sympathetic* sanction as a branch of the natural one, describing it to be the feeling by which we are deterred from falsehood, by regret for the pain and injury which it may cause others. He also considers the imperfection of the natural sanction to consist in its being better calculated to prevent falsehood in toto than to secure circumstantial truth in particulars (*l*); which, taking his definition of that sanction, is no doubt the case.

§ 17. The *moral* sanction may be described in a word. Men, having found the advantages of truth and the inconveniences of falsehood in their mutual intercourse, and, perhaps, being further actuated by the reflection that truth is in conformity with the will of God and the laws of Nature, have by general consent affixed the brand of disgrace on a voluntary departure from it; and hence, as observed by several authors, the infamy attached to the word "liar" (*m*). A great infirmity of the moral sanction is, that deriving, as it does, all its force from the value men set on the opinions of others, it naturally

(*h*) § 221, 2nd Ed. In another place, § 15, 2nd Ed., he says, "S'il y a une tendance naturelle des esprits vers le vrai, comme des corps vers le centre de la terre, l'homme, étant libre, peut obéir ou ne pas obéir à cette tendance, et il n'arrive que trop souvent que ses déclarations soient mensongères."

(*i*) Essay on Truth.

(*k*) 5 Benth. Jud. Ev. 636.

(*l*) 1 *Id.* 207, 208.

(*m*) See Pufendorf, Jus Nat. et Gent. lib. 4, cap. 1, § 8; Benth. Jud. Ev. bk. 1, ch. 11, sect. 5, and Lord Bacon's Essay on Truth.

teaches them to conceal their own faults from public view, even at the sacrifice of truth (*n*).

§ 18. Lastly, there is the *religious* sanction; which is founded on the belief that truth is acceptable, and falsehood abhorrent, to a Governor of the Universe, who will, in some way, reward the one and punish the other. The divine punishment for falsehood, however, being prospective and invisible, the weight of this sanction is not so great as it would otherwise be; and perjury is often committed by persons whose religious faith cannot be doubted, but who presumptuously hope, either by their subsequent good conduct or some other means, to efface its guilt in the eyes of Heaven.

§ 19. The effect of these three sanctions is much greater than might at first sight be supposed. They are in continual operation as efficient causes for the production of truth, and rendering its enunciation natural and habitual to men; while every incentive to falsehood can only be looked upon as a species of disturbing force, which acts occasionally and exceptionally. Of few persons indeed can it be said, that their adherence to truth is undeviating at all times; with many its observance appears to depend on circumstances, accident, or caprice; with some the practice of lying seems inveterate; while certain classes of persons systematically, and as it were on principle, withhold the truth from other classes on particular subjects. But after every abatement has been made for aberrations, the quantity of truth daily spoken immeasurably exceeds that of falsehood (*o*); and it is well remarked by Bentham, that "from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times for once that wilful falsehood has taken its place" (*p*).

§ 20. It is, however, of the utmost importance to observe, that any of those springs of action which we have denominated "sanctions of truth" may be found on the wrong side; *i. e.*, producing falsehood instead of truth. If the natural sanction rests solely on a love of ease, that love, while it represses the invention of false facts, equally prevents the taxing the memory to give a perfect narrative of what has been witnessed; and if supposed to spring from a love of truth and justice, the party called on to give evidence may consider the ends

(*n*) 1 Benth. Jud. Ev. 212–216.

(*o*) Bonnier, Traité des Preuves, § 15, 2nd Ed.

(*p*) 5 Benth. Jud. Ev. 82. We have read somewhere of a country, the inhabitants of which purposely and systematically gave false answers to all questions respecting its topography. Still a traveller was enabled to obtain the information he wished for respecting it, by questioning them upon incidental and collateral facts, when the truth, naturally oozing out, supplied him with materials for arriving at the knowledge sought.

of *justice* advanced by withholding the *truth*; as, for instance, where the disclosing it will induce the condemnation of a criminal whose prosecution, though strictly legal, he deems morally unjust, or whose future good behaviour he thinks will be better insured by escape than by punishment. But of the sanctions in question, none is so frequently divided against itself as the moral. Conduct condemned by one portion of society is often applauded by the rest, and persons desirous of the good opinion of certain classes are often satisfied to attain it at the cost of sinking themselves in that of others, and tell or suppress the truth as may best advance that object. "The credibility of a witness," says the Marquis Beccaria (*q*), "may be in some degree lessened when he is member of some private society, whose usages and maxims are either not well known, or different from those of the public. Such a man has not only his own passions, but those of other people." Even the religious sanction has been enlisted in the cause of falsehood. Particular forms of religion allow it in certain cases (*r*); and the truth has often been sacrificed by religious persons in order to avoid bringing scandal on their creeds.

§ 21. The credit due to human testimony, assuming that we correctly understand the language employed, is the compound ratio of the witness's means of acquaintance with what he narrates, and of his intention to narrate it truly (*s*). In estimating the latter, three things are to be attended to: 1. Whether he labours under any interest or bias, which may sway him to pervert the truth. 2. His veracity on former occasions, — evidenced either by our own experience or credible proof. 3. His manner and deportment in delivering his testimony. "Interrogabit judex," says one of the canonists (*t*), "testes in quâlibet causâ, eosque diligenter examinabit, de singulis circumstantiis diligenter inquirans, de causis videlicet, de personis, loco, tempore, visu, auditu, scientiâ, credulitate, famâ, et certitudine, cæterisque, quæ ad rem facere, et negotio convenire existimabit. Illud quoque subtiliter animadvertere non omittet, quo vultu, quâ constantiâ, quâ animi trepidatione testes deponant; cùm interdum

(*q*) "La credibilità di un testimonio può essere alcune volte sminuita, quando egli sia membro di alcuna società privata, di cui gli usi e le massime sieno o non ben conosciute, o diverse dalle pubbliche. Un tal uomo ha non solo le proprie, ma le altrui passioni." — Beccaria, Dei Delitti e delle Pene, § 8.

(*r*) See Halhed's Code of Gentoo Laws, &c., cited *infrà*, bk. 2, pt. 1, ch. 2. Whether a violation of truth is allowable in any, and if so, in what cases, has been much considered by moralists and divines. See Pufendorf, Jus Natur. et Gent. lib. 4, cap. 1, §§ 7 *et seq.*; Bentham's Jud. Ev. bk. 1, ch. 11, sect. 5; Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 15, &c.; and bk. 1, ch. 5. It is, however, universally agreed that the obligation to tell truth is the rule; the licence to falsehood, if such exists, the exception.

(*s*) See *infrà*, § 73, and notes.

(*t*) Lancelottus, Institutiones Juris Canonici, lib. 3, tit. 14, §§ 11, 12.

ex his, vel ipsis invitis testibus, magis quàm ex verborum serie rerum veritas elucescat." "A consideration of the demeanour of the witness upon the trial," says one of our books (*u*), "and of the manner of giving his evidence, both in chief and upon cross-examination, is oftentimes not less material than the testimony itself. An overforward and hasty zeal on the part of the witness, in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering, without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those where he knows contradiction to be impossible; an affectation of indifference, — are all to a greater or less extent obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity." This, however, must be taken with some qualification. "A witness," says a modern writer (*x*), "may be very honest, although his demeanour is, in some respects, open to censure, and deserves rebuke. Constitution of mind, habit, manner of life, may give him a coarse, blunt tongue and a manner in appearance, yet not meant to be, uncivil or disrespectful. Such a rough, unrefined nature or carriage may well consist with a habit of speaking the truth, with an abhorrence of falsehood, and a wish and determination to give true evidence. . . . Demeanour consisting in confusion, embarrassment, hesitation in replying to questions, and even vacillating or contradictory answers, are not necessarily a proof of dishonesty in a witness, because this deportment may arise from bashfulness, or timidity, and may be the natural and inevitable effect of an examination by a skilful, practised, perhaps unscrupulous, advocate, whose aim in his questions is, to entangle, entrap, and stupefy the witness, and cause him to say and unsay anything or everything. It may not be good behaviour in a witness to suffer his eyes to wander about the court while he is under examination, but this conduct may not be unnatural in the midst perhaps of an entirely new scene to him; and the distraction of mind occasioned by that employment of his eyes may well cause

(*u*) 1 Stark. Ev. 547, 3rd Ed.; *Id.* 822, 823, 4th Ed.

(*x*) Ram on Facts, pp. 173–174.

him, on returning to his duty, to answer hastily, and without consideration. But in all this there may be no intentional disrespect to the court; and the witness notwithstanding may be a very honest one. Again, it happens to all persons occasionally, without thought to use one word for another, making the sense very different from what was intended; unconsciously we say that we did not mean to say. In like manner, a witness may inadvertently contradict himself."

§ 22. The capacity of a party to give a faithful account of things depends on — 1. The opportunities he has had of observing the matters he narrates. 2. His powers, either natural or acquired, of perception and observation; and here it is important to ascertain whether he is a discreet, sober-minded person, or imaginative and imbued with a love of the marvellous, and also whether he lies under any bias likely to distort his judgment. 3. Whether the circumstances he narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself. "Where the chemist and the physician see a dangerous poison, the kitchen-maid may see nothing more than an immaterial flaw in one of her pans, the cook may behold an innocent means of recommending herself to the palate through the medium of the eye. Where the botanist sees a rare, and perhaps new, plant, the husbandman sees a weed; where the mineralogist sees a new ore, pregnant with some new metal, the labourer sees a lump of dirt, not distinguishable from the rest, unless it be by being heavier and more troublesome" (*y*). 4. His memory; and here, whether the transaction is ancient or recent, whether his recollection has been refreshed by memorandum, conversation, &c.

§ 23. The probative force arising from concurrent testimonies is the compound result of the probabilities of the testimonies taken singly (*z*). But when testimonies conflict or clash with each other, we must form the best conclusion we can as to their *relative* values.

§ 24. There are two things which must never be lost sight of when weighing testimony of any kind: 1. The consistency of the different parts of the narration. 2. The possibility or probability, the impossibility or improbability, of the matters related, — which afford a sort of corroborative or counter-evidence of those matters. By probability, as already observed (*a*), is meant the likelihood of anything to be true, deduced from its conformity to our knowledge, observation, and experience. When a supposed fact is so repugnant to the laws of Nature,

(*y*) 1 Benth. Jud. Ev. 164–165.
(*z*) See *infrà*, § 73, and notes.
(*a*) *Suprà*, § 7.

assumed for this purpose to be fixed and immutable (*b*), that no amount of evidence could induce us to believe it, such supposed fact is said to be *impossible*, or *physically* impossible. There is likewise *moral* impossibility, which, however, is nothing more than a high degree of improbability.

§ 25. As the knowledge, observation, and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ; and we continually find that not only are the most opposite judgments formed as to the credence due to alleged facts, but that a fact which one man considers both possible and probable, another holds to be physically impossible (*c*). With respect to this kind of impossibility, our notions will be more or less accurate according to our acquaintance with the laws of Nature; for many phenomena in apparent violation of her laws have been found, on examination, to be the regular consequences of others previously unknown. The story of the king of Siam has often been quoted, who believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even an elephant, could walk on it, which that monarch at once pronounced a palpable falsehood (*d*). About three centuries and a half ago, when Columbus declared his conviction that the East Indies could be reached by sailing westward, and offered to make the trial, the learned world was prepared to demonstrate its *physical impossibility* (*e*); while similar language has, in our own day, been applied to the project for effecting the passage of the Atlantic Ocean by steam. So the assertion that England could be crossed in a carriage travelling at the rate of sixty miles an hour; or that a message could, with the speed of lightning, be transmitted through many miles of sea, at the depth of twenty or thirty fathoms, — would, for many ages past, by the great bulk of mankind at least, have been pronounced a lie too gross to require confutation; and the bare suggestion that a message might be transmitted in like manner from one shore of the Atlantic to the other, would either have con-

(*b*) The judicial proceedings of modern times are conducted on the assumption that the laws of Nature are fixed and immutable; not from disbelief in miraculous interposition, but because such interposition is unquestionably rare, and it would be dangerous in the highest degree if tribunals were allowed to adopt its supposed occurrence as a principle of decision.

(*c*) He may even *know* it to be so; *e. g.*, a plausible but fallacious chain of presumptive evidence tends to indicate A. as the person who committed a crime at B. His guilt may seem probable to C.; but D., E., and F. know that it is impossible; for at the moment the crime was perpetrated, they were at G., and saw A. there.

(*d*) Locke, bk. 4, ch. 15, § 5.

(*e*) See the Life of Columbus, by Washington Irving, vol. i. bk. 2, ch. 4. A curious fac-simile of the map of the world, as during the middle ages it was supposed to exist, is given in Miller's Testimony of the Rocks, p. 363.

signed a man to confinement as a hopeless lunatic, or sent him to the stake as an emissary of the powers of darkness. And, lastly, different persons may consider the same thing possible, or even probable, for very opposite reasons. In the infancy of aërostation, when its attempts were watched with anxiety by the learned, and ridicule by the ignorant, some Japanese, on seeing a balloon ascend at St. Petersburg, expressed no surprise whatever; and being asked the cause of their unconcern, said it was nothing but magic, and in Japan they had practitioners in magic in abundance (*f*).

§ 26. Before dismissing this subject, it is to be observed, that falsehood in human testimony presents itself much more frequently in the shape of misrepresentation, incompleteness, or exaggeration, than of total fabrication (*g*). "Qui non liberè veritatem pronunciat, proditor veritatis est" (*h*). A lie is never half so dangerous as when it is woven up with some indisputable verity; and hence the use of the comprehensive form of oath administered in English courts of justice, that the deposing witness is to tell "the truth, the whole truth, and nothing but the truth." So an extensive field of mischief is opened by mere exaggeration; for "as truth is made the groundwork of the picture, and fiction lends but light and shade, it often requires more patience and acuteness than most men possess, or are willing to exercise, to distinguish fact from fancy, and to repaint the narrative in its proper colours. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent"(*i*).

§ 27. There are several divisions of evidence which, although in some degree arbitrary, it will be found useful to bear in mind. In the first place, then, evidence is either *direct* or *indirect*; according as the principal fact follows from the evidentiary — the *factum probandum* from the *factum probans* — immediately or by inference. In jurisprudence, however, direct evidence is commonly used in a

(*f*) 3 Benth. Jud. Ev. 315. The Chapter on Improbability and Impossibility in Bentham's work on Judicial Evidence, — bk. 5, ch. 16, — though an unfinished sketch, and by no means free from error, will repay perusal.

(*g*) This is particularly the case when *words* are repeated. "Il tuono, il gesto, tutto ciò che precede e ciò che siegue, le differenti idee che gli uomini attacano alle stesse parole, alterano e modificano in manièra i detti di un' uomo, che è quasi impossibile il repreterle quali precisamente furono dette. Di più, le azioni violente, e fuori dell' uso ordinario, quali sono i veri delitti, lasciano traccia di se nella moltitudine delle circonstanze, e negli effetti che ne derivano, &c.: ma le parole non rimangono che nella memoria, per lo più infedele, e spesso sedotta, degli ascoltanti. Egli è adunque di gran lunga più facile una calunnia sulle parole che sulle azioni di un uomo." — Beccaria, Dei Delitti e delle Pene, § 8.

(*h*) 11 Co. 83 a; 4 Inst. Epil.

(*i*) Tayl. Evid. § 46, 5th Ed., and Lectures there cited.

secondary sense; viz., as limited to cases where the principal fact, or *factum probandum*, is attested directly by witnesses, things, or documents (*k*). Indirect evidence,[1] known in forensic procedure by the name of "circumstantial evidence" (*l*), is either conclusive or presumptive: *conclusive*, where the connection between the principal and evidentiary facts — the *factum probandum* and *factum probans* — is a necessary consequence of the laws of Nature; *presumptive*, where it only rests on a greater or less degree of probability (*m*). In practice this latter is termed "presumptive evidence," — obviously a secondary sense of the word; for direct evidence is in truth only presumptive, seeing that it rests on a presumption of the accuracy and veracity of witnesses, things, or documents (*n*).

§ 28. Again, evidence is either *real* or *personal* (*o*). By *real* evidence is meant evidence of which any object belonging to the class of *things* is the source, *persons* also being included, in respect of such properties as belong to them in common with things (*p*). This sort of evidence may be either *immediate*, where the thing comes under the cognisance of our senses; or *reported*, where its existence is related to us by others. *Personal* evidence is that which is afforded by a human agent; either in the way of discourse, or by voluntary signs. Evidence supplied by observation of *involuntary* changes of countenance and deportment comes under the head of real evidence (*q*).

§ 29. The next division of evidence deserves particular attention, both for its own sake, and because it will be found to run through the whole system of English forensic procedure (*r*). It is this, that all evidence is either *original* or *unoriginal*. By *original* evidence is

(*k*) "Omnis nostra probatio aut directa est aut obliqua. Directa, cum id quod probare volumus ipsis tabulis aut testimoniis continetur. Obliqua, cum id quod intendimus ex tabulis aut testimoniis argumentando colligitur:" Vinnius, Jurispr. Contract. lib. 4, c. 25. See also 1 Stark. Evidence, 15, 3rd Ed.; and *Id.* 21, 4th Ed.

(*l*) It may be doubted whether these terms are, strictly speaking, synonymous. Circumstantial evidence is that species of indirect evidence which municipal law deems sufficiently proximate to form the basis of judicial decision. Where, for instance, philosophical or historical truths are established by remote inference or analogy from facts, the evidence of those truths is *indirect*, but can scarcely be called *circumstantial*.

(*m*) Dividuntur (signa) in has primas duas species, quod eorum alia sunt quæ *necessaria* sunt, quæ Græci vocant τεκμήρια; alia non necessaria, quæ σημεῖα. Prioria illa sunt quæ aliter habere se non possunt * * * Alia sunt signa non necessaria, quæ εἰκότα Græci vocant:" Quintil. Inst. Orat. lib. 5, c. 9. Some editions have εἰκαῖα instead of εἰκότα.

(*n*) *Suprà*, § 7.

(*o*) 1 Benth. Jud. Ev. 53.

(*p*) 3 *Id.* 26; and 1 *Id.* 53. This is the "evidentia rei vel facti" of the civilians. Mascard. de Prob. Quæst. 8; Calv. Lexic. Jurid.; 1 Hagg. Cons. Rep. 105. See *infrà*, bk. 2, pt. 2.

(*q*) We have slightly deviated from the definition given in 1 Benth. Jud. Ev. 53, 54.

(*r*) See bk. 1, pt. 1, and bk. 3, pt. 2, cc. 3 and 4.

[1] See § 293, n. 1, *infra*.

meant evidence, either ab intrà or ab extrà, which has an independent probative force of its own; *unoriginal*, also called *derivative, transmitted*, or *second-hand* evidence, is that which derives its force from, through, or under some other. And of this derivative evidence there are five forms: 1. When supposed oral evidence is delivered through oral; this is *hearsay* evidence, in the strict and primary sense of the term. 2. When supposed written evidence is delivered through written. 3. When supposed oral evidence is delivered through written. 4. When supposed written evidence is delivered through oral. 5. When real evidence is *reported*, either by word of mouth or otherwise (*s*).[1]

§ 30. The infirmity of derivative evidence as compared with its primary source will be apparent on the slightest reflection. Take the most obvious case, — supposed oral evidence delivered through oral. A. deposes that B. told him that he witnessed a certain fact. If B. were the deposing witness there would be only two chances of error in believing his testimony; viz., that he may have been mistaken as to what he thought he witnessed; or, that his narrative may be intentionally false. But when his testimony comes to us through the relation of A., two fresh chances of error are introduced; viz., that A. may have either mistaken the words uttered by B., or may intend to misrepresent them. There is indeed an additional, although weak chance of obtaining the truth through double falsehood or mistake; *e. g.*, the question is, was X. at a certain time at a certain place. A. was there and saw him; but intending to deceive B., tells him he was not. B. believes this; but with the intention of deceiving, says to C., that A told him that X. was there. In relying on this supposed statement of A., vouched by B., C. has got the truth (*t*). It is perhaps superfluous to add that the danger increases, the greater the number of media through which evidence has come; for with each additional witness, or other medium, two fresh chances of error are introduced (*u*).

§ 31. We shall notice one other division, the value of which has been too much overlooked. Evidence is either *pre-appointed* (*x*), otherwise called *pre-constituted* (*y*), or *casual* (*z*). *Pre-appointed* evi-

(*s*) See 3 Benth. Jud. Ev. 396.

(*t*) See Lacroix, Calcul des Probabilités, § 142.

(*u*) For the proof of historical facts by derivative evidence, see the second Part of this Introduction.

(*x*) "Pre-appointed evidence:" 1 Benth. Jud. Ev. 256; *Id.* 435

(*y*) "Preuves Préconstituées:" Bonnier, Traité des Preuves, §§ 97 and 379, 2nd Ed.; and part. 2, liv. 2.

(*z*) "Casual Evidence:" Bentham's Rationale of Evidence, &c., App. A., ch. 8.

[1] See §§ 89, n. 1, 492, n. 1, *infra*.

dence is defined by Bentham, in one place (*a*), to be where "the creation or preservation of an article of evidence has been, either to public or private minds, an object of solicitude, and thence a final cause of arrangement taken in consequence (viz., in the view of its serving to give effect to a right, or enforce an obligation, on some future contingent occasion); the evidence so created and preserved comes under the notion of *pre-appointed* evidence." In another place (*b*) he speaks of it as *written* evidence, created with the design of being employed on the occasion and for the purpose of some suit, or cause, not individually determined. Under this head come public documents, such as records, registers, &c.,— together with deeds, wills, contracts, and other instruments for the facilitating of proof on future occasions; which are drawn up by individuals either in compliance with the positive requirements of law, or with a view to the convenience of themselves or others. But it is a mistake to assume that this kind of evidence must necessarily be in a *written* form (*c*). When a party about to do a deliberate act calls particular persons to witness, in order that they may be able to bear testimony to it on future occasions, their evidence is *pre-appointed* or *pre-constituted*, as much as a deed which professes to be made *in witness* of the matters which it contains. There are several instances in the Anglo-Saxon laws where sales were required to be made in the presence of particular classes of persons, or in particular places (*d*). A nuncupative will under the 29 Car. 2, c. 3, s. 19 (*e*), was not good unless the testator "bid the persons present, or some of them, bear witness that such was his will, &c.;" and the Anatomy Act, 2 & 3 Will. 4, c. 75, s. 8, enacts, that any person may "either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, direct that his body after death be examined anatomically, &c." (*f*). Any evidence not coming under the head of "pre-appointed evidence" may be denominated "casual evidence" (*g*).

(*a*) 2 Benth. Jud. Ev. 435.

(*b*) 1 *Id.* 56.

(*c*) See Bonnier, Traité des Preuves, §§ 379, 380, 2nd Ed.

(*d*) See those collected in 1 Greenl. Ev. § 262, n. (4), 7th Ed.

(*e*) Repealed by 7 Will. 4 & 1 Vict. c. 26.

(*f*) The direction given in Matt. xviii. 15, 16, seems a clear case of unwritten pre-appointed evidence: "If thy brother shall trespass against thee, go and tell him his fault, &c. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." See also Genesis, xxiii. 17, 18.

(*g*) "Casual Evidence," Bentham's Rationale of Evidence, &c. App. A., ch. 8.

AMERICAN NOTES.

(§ 11) EVIDENCE DEFINED. — Greenleaf (1 Greenl. Ev. § 1) defines as follows: "Evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." This definition apparently includes too much; as pointed out by Bentham, evidence is all legal means, *exclusive of mere argument*. Conf. Wills. Circ. Ev. 2; 1 Stark. Ev. 10; 1 Phil. Ev. 1; 1 Whar. Ev. § 3. Mr. Justice Stephen defines evidence (Steph. Dig. Law Ev. art. 1) as follows: "Evidence means (1) statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry; (2) documents produced for the inspection of the court or judge." As to what evidence is *admissible*, see § 33, n. 1, *infra*.

"*Fact.*"—All such definitions, including that of Bentham indorsed by Best, labor under the disadvantage that no accurate definition has yet been given of what is legally understood by the term "fact," used in defining the term "evidence." Mr. Justice Stephen (Dig. Law Ev. 3d ed. art. 1) has abandoned the attempt at definition contained in his two earlier editions, and contents himself with the statement that "fact" "includes the fact that any mental condition of which any person is conscious exists." Wheelden *v.* Wilson, 44 Me. 1; Stevens *v.* Stevens, 150 Mass. 557; Barnhart *v.* Fulkerth, 93 Cal. 497; Over *v.* Schiffling, 102 Ind. 191; Homans *v.* Corning, 60 N. H. 418; Jefferds *v.* Alvard, 151 Mass. 94; Hamburg *v.* Wood, 66 Tex. 168; Mut. Life Ins. Co. *v.* Hillmon, 145 U. S. 285. But see McHugh *v.* Dowd, 86 Mich. 412; Meinhardt *v.* Mode, 22 Fla. 279. For Best's definition of "fact," see § 33, *infra*. The term "matter of fact" resolves itself, therefore, into a convenient phrase, only intelligible when useless, and vaguely opposed to the equally vague "matter of law," from which it could accurately be distinguished simply by drawing a list. Conf. § 82, n. 2, *infra*. The following distinction has, however, been plausibly taken. "Matter of fact" is anything which is the subject of testimony; "matter of law" is the general law of the land, of which courts will take judicial cognizance. (See § 33, n. 1 (6), *infra*.)

Examples.—Physical condition is a fact. Tierney *v.* R. R., 33 Minn. 311. Law of another State is a fact. Miller *v.* McVeagh, 40 Ill. App. 532; Kennard *v.* Kennard, 63 N. H. 303; Peo. *v.* McQuaid, 85 Mich. 123; Lord *v.* State, 17 Neb. 526. The decisions of the highest tribunal are the best evidence of the law. Horton *v.* Reed, 13 R. I. 366; Bridgers *v.* R. R., 25 S. C. 24. So of statutes of another State and their construction. Williams *v.* Finley, 40 Oh. St. 342. So of meaning of foreign language. Linney *v.* Wood, 66 Tex. 22. Rate of speed is matter of fact. Guggenheim *v.* R. R., 66 Mich. 150. So a former adjudication must be proved as a matter of fact. McCormick *v.* Herndon, 67 Wis. 648.

PART II.

JUDICIAL EVIDENCE.

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§ 32. HAVING considered the subject of evidence apart from jurisprudence and judicature, for the sake of distinction termed "natural" or "moral evidence," we proceed to that of "JUDICIAL EVIDENCE," which is a species of the former, with the view of showing its essential difference and characteristics.

§ 33. "Judicial evidence" may be defined, the evidence received by courts of justice in proof or disproof of *facts,* the existence of which

comes in question before them.[1] By *facts* here must be understood the res gestæ of some suit, or other matter, to which when ascertained the law is to be applied; for although, in logical accuracy, the existence or non-existence of a *law* is a question of fact, it is rarely spoken of as such, either by jurists or practitioners (*a*).[2] By "law" here, we mean the general law of each country, which its tribunals are bound to know without proof; for they are not bound, at least in general, to take judicial cognisance of local customs (*b*) or the laws of foreign nations (*c*), — the existence of both of which must be proved as facts (*d*).

§ 34. Judicial evidence, as already observed, is a species of the genus "evidence," and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law (*e*). Some of these rules are of an *exclusionary* nature, and reject, as *legal* evidence, facts in themselves entitled to consideration. Others again are what may be called *investitive; i. e.*, investing natural evidence with an artificial weight, and even, in some instances, attributing the property of evidence to that which, abstractedly speaking, has no probative force at all.

(*a*) Voet. ad Pand. lib. 22, tit. 3, n. 8; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 7; Vinnius, Jurispr. Contr. lib. 4, cap. 25; Bonnier, Traité des Preuves, §§ 2 and 23, 2nd Ed. See also Co. Litt. 283 a.

(*b*) Heinec. ad Pand. pars 4, § 119; *Id.*, pars 1, § 103; Co. Litt. 115 b, 175 b, Tayl. Ev. § 5, 5th Ed.

(*c*) Story, Confl. Laws, § 637 *et seq.*, 5th Ed.; Ph. and Am. Ev. 624; Tayl. Ev. § 5, 5th Ed.

(*d*) See *Clegg* v. *Levy*, 3 Camp. 166; *Millar* v. *Heinrick*, 4 *Id.* 154. In the U. S. A., in the absence of all evidence, the laws of a foreign country are presumed to be the same as "in the U. S. A., but where a difference is alleged, the law must be proved as a fact." *Kilgore* v. *Buckley*, 14 Conn. 362.

(*e*) "Probatio est actus *judicialis*, quo de facto dubio fides fit judici;" Heinec. ad Pand. pars 4, § 115. "Probatio est intentionis nostræ *legitima* fides, quam judici facit aut actor, aut reus:" Matth. de Prob. c. 1, n. 1. See also Voet. ad Pand. lib. 22, tit. 3, n. 1. "Probatio est ostensio rei dubiæ per *legitimos modos* judici facienda, in causis apud ipsum judicem controversis, &c. Nec in definitione omisi 'per legitimos modos,' hâc de causâ, quia multi sunt modi, ex quibus fit probatio, ut per testes, per instrumenta, per evidentiam facti, per justam præsumptionem, per conjecturam, et per multos alios modos, &c. Ea enim ratione dixi *legitimos*, ut ostenderem hujusmodi probationes *juxta legis normam* debere fieri in hujusmodi probationibus observatam, hoc est secundum formam libelli, secundum quam pronuntiandum est ex allegatis:" Mascardus de Prob. Quæst. 2, n. 17, 21, 22, 23.

[1] *Admissible Evidence.* Evidence, as defined in § 11, *supra*, to be admissible, fulfils three conditions: (1) It tends to establish facts in issue or facts relevant thereto (see § 251, n. 1, *infra*); (2) It does not fall within the scope of the four "exclusionary rules," so called, forbidding evidence of *res inter alios acta* (see § 506, n. 1, *infra*), hearsay (see § 492, n. 1, *infra*), opinion (see § 511, n. 1, *infra*), or character (see § 256, n. 1, *infra*); (3) It is not excluded on any ground of privilege (see § 578, n. 1, *infra*).

[2] See § 11, n. 1, *supra*.

§ 35. And here the question presents itself, whence the necessity, whence the utility, of such rules? Doubtful and disputed facts, it may be said, forming the subject-matter about which natural and judicial evidence are alike conversant, and truth being ever one and the same, must not any rules shackling the minds of tribunals in its investigation be a useless, if not mischievous, adjunct to laws? On examination, however, it will appear, that a system of judicial proof is not only highly salutary and useful, but that an absolute necessity for it arises out of the very nature of municipal law and the functions of tribunals, and that some such system is to be found among the legal institutions of every country, — we think we may say, without a single exception.

§ 36. The evidence adduced in courts of justice, being, as it were, a handmaid to jurisprudence, might reasonably be expected to partake of the nature and follow the law of the science to which it is ancillary. And this impression is confirmed, not removed, by a closer examination of the subject; for it will be found that the same reasons which give birth to municipal law itself show the necessity for some authoritative regulation of the proofs resorted to in its administration. But in order to set this in a clear light, we must point attention to a distinction often overlooked, and the losing sight of which has been the source of much mistake and confusion. According to writers on natural law, justice is divided into *expletive* and *attributive* (*f*). By the former — sometimes also denominated rigorous justice, perfect justice, or justice properly so called — is meant that whereby we discharge to another, duties to which he is entitled by virtue of a perfect and rigorous obligation, and the performance of which, if withheld, he has a right to exact by force. The latter consists in the discharge of duties arising out of an imperfect or non-rigorous obligation, the performance of which cannot be so exacted, but is left to each person's honour and conscience. These are comprehended under the appellations of humanity, charity, benevolence, &c. Under a system of municipal jurisprudence, expletive justice must be understood to mean that which may be claimed of strict legal right; and attributive justice that which tribunals can either not notice at all, or only in virtue of an equitable jurisdiction modifying and restraining the rigour of the law.

§ 37. So soon as societies were formed and the relations of sovereignty and subjection established, the imperfections of our nature

(*f*) Burlamaqui, Principes du Droit de la Nature et des Gens, pt. 1, ch. xi. § 11; Grotius, De Jur. Bell. ac Pac lib. 1, cap. 1, § viii. "Facultatem respicit justitia expletrix, aptitudinem respicit attributrix:" Grot. *in loc.*

indicated the necessity for municipal law. To administer perfect *attributive* justice, in all questions to which the innumerable combinations of human action give rise, is the high prerogative of Omniscience and Impeccability. For to this end are required, not only an unclouded view of the facts as they have occurred, and a decision, alike unerring and uncorrupted, on the claims of the contending parties, but a complete foresight of all the consequences, both direct and collateral, down to their remotest ramifications, which will follow from that decision. The hopelessness of ever accomplishing this became early visible to the reflecting portion of mankind; and the observation of nature (*g*) having taught them that great ends are best attained by the steady operation of fixed *general* laws, they conceived the notion of framing *general rules* for the government of society, — rules based on the principle of securing the largest amount of truth and happiness in the largest number of cases, however their undeviating action may violate attributive justice, or work injury in particular instances (*h*). The rules established by authority for this purpose in each country constitute its municipal law.

§ 38. The reasons for applying these principles of legislation to evidence received in courts of justice, although less obvious, are equally satisfactory with those which originated the principles themselves. In the first place, then, we would observe, that the relations of cause and effect are manifestly innumerable; especially when those cases are taken into the account where the effect does not follow immediately from its ultimate cause, and is only the mediate consequence of some subalternate one. Now "Optima est lex, quæ minimum relinquit arbitrio judicis" (*i*); but the power of a tribunal, however nicely defined by rules of substantive law, would soon be found absolute in reality, if no restraint were imposed on its discretion in declaring facts proved or disproved; and we accordingly find that the laws of every well-governed state have established rules regulating the quality, and occasionally the quantity, of the evidence necessary to form the basis of judicial decision. And here the analogy to the

(*g*) "Le ley imitate nature." Per Doddridge, J., in *Sheffeild* v. *Ratcliffe*, 2 Rol. R. 502. Sicut Natura non facit saltum, ita nec Lex; Co. Litt. 238 b. See also Co. Litt. 79 a; Jenk. Cent. 1, Case 30; Hob. 144.

(*h*) Our common-law authorities are strong to this effect. — "Ad ea quæ frequentiùs accidunt jura adaptantur:" Co. Litt. 238 a; 2 Inst. 137; 5 Co 127 b; 6 Co. 77 a. "There hardly exists," says Lord Ellenborough, in *R.* v. *The Inhabitants of Harringworth*, 4 M. & Sel. 350, "a general rule, out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, has induced courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived from their application."

(*i*) Bac. de Augm. Scient. lib. 8, cap. 3, tit. 1, Aphorism. 46

other branches of municipal law seems complete. The exclusion of evidence by virtue of a general rule may, in particular instances, exclude the truth, and so work injustice; but the mischief is immeasurably compensated by the stability which the general operation of the rule confers on the rights of men, and the feeling of security generated in their minds by the conviction that they can be divested of them only by the authority of law, and not at the pleasure of a tribunal. The two principal checks which the law of England imposes on its tribunals in this respect are, first, the prohibiting judges and jurymen from deciding *facts* on their own personal knowledge, and placing them, as it were, in a state of legal ignorance as to almost everything relating to the matters in question, except what is established before them by evidence (*k*). Its maxim is, "Non refert quid notum sit judici, si notum non sit in formâ judicii" (*l*); and the principles, "De non apparentibus et non existentibus eadem est ratio" (*m*), "Idem est non esse et non apparere" (*n*), "Quod non apparet non est" (*o*), "Incerta pro nullis habentur" (*p*), &c., so false in philosophy, become perfectly true in our jurisprudence. The second is, the exacting as a condition precedent even to the *reception* of evidence, that there be an open and visible connection between the principal and evidentiary facts, — "Nemo tenetur divinare" (*q*); "Probationes debent esse evidentes (id est), perspicuæ, et faciles intelligi" (*r*). This, indeed, is only following out a great principle which runs through our whole law, — "In jure non remota causa, sed proxima spectatur" (*s*). One or two instances will suffice for illustration. If things are traced up to their ultimate sources, the remote though *chief* cause of the appearance of a criminal at the bar might be found in his parents, his education, the example of others, the law itself, or even the very judge by whom he is tried; still the tribunal cannot enter upon such matters, and must only look at the *proximate* cause, — his own act. So the non-payment of a debt has for its proximate cause the debtor's

(*k*) 7 H. IV. 41, pl. 5; Plowd. 83; 1 Leon. 161. See the authorities in the following notes; and *infrà*, bk. 1, pt. 1. The canonists seem to have been somewhat loose in this respect. See Decret. Greg. IX. lib. 5, tit. 1, l. 9; Calvin, Lex Jurid. voc. "Notorium;" Gibert, Corpus Jur. Canon. Proleg. Pars Post. tit. 7, cap. 2, § 2, N. ix.; and Devot. Inst. Jur. Can. lib. 3, tit. 14, § 10, not. 1.

(*l*) 3 Bulst. 115. "Nous ne poiomous pas aler a jugement sur notorie chose, eins selonque ce que le proces est devant nous mesmes." Per Herle, C. J., H. 7 Edw. III. 4 A. pl. 7.

(*m*) 4 Co. 47 a; 5 Co. v. b.; 12 *Id.* 53, 134; 3 Bulst. 110; Hob 295; 1 T. R. 404, 7 M. & W. 437; 10 Bingh. 47; 6 Bingh. N. C. 539; 7 M. & W. 437.

(*n*) Jenk. Cent. 5, Cas. 36.

(*o*) 2 Inst. 479.

(*p*) Davys, 33; Lofft, M. 555; Broom's Max. xxvii. 3rd Ed.

(*q*) 4 Co. 28 a, and 66 b; 10 Co. 55 a. See also Bac. Max. sub reg. 3; Litt. R. 98; Lofft, M. 559.

(*r*) Co. Litt. 283 a.

(*s*) Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 18 C. B. 379; 18 Jurist, 962; 6 B. & S. 881; H & R. 61. See *infrà*, bk. 1, pt. 1.

neglect, but the ultimate cause may be the default of others whose duty, either legally or morally, it was to have supplied him with money.

§§ 39, 40 (*t*) And here must be noticed a false principle which is to be found in some systems of jurisprudence, and which runs through Bentham's work on judicial evidence; viz., the assumption that there is a perfect analogy between justice administered by a parent in his family, and justice administered by municipal tribunals between man and man. The observation is as old as the days of Aristotle, that a commonwealth is not to be confounded with a family, as though a large family were nothing different from a small commonwealth (*u*); and a very little reflection will show the difference between them. The parent in his family administers a kind of *attributive* justice. Both by natural and municipal law he is invested with, comparatively speaking, an absolute power over his children: this is indispensably necessary, to guide the conduct and form the characters of those in whom reason and experience are almost a blank; and the feeling of parental affection is so strong that this power may in general be safely intrusted to him. But the case is quite different with a sovereign, or judge, governing for the common welfare a set of beings of matured intellect like himself. A pure, unlimited monarchy is unquestionably the natural and primitive form of government, but does it thence follow that it is the best at the present day, and that all others ought to be extirpated? On the other hand, how absurd would it be to argue, that because a constitutional monarchy is an excellent form of government for a country, each private individual should establish one in his family! The very statement of these propositions is their refutation; and yet it is the same sort of reasoning which would infer that pre-established forms are useless in public judicial investigations, because they would be useless, or worse, in foro domestico.

§ 41. Again, the duty of a judicial tribunal in dealing with facts is not limited to the abstract question of their existence; for whether materials for definite judgment or belief respecting it are forthcoming or not, a *decision* must be given, to be followed by speedy, if not immediate, action. "Interest (or 'expedit') reipublicæ ut sit finis litium" (*x*); "Ne lites immortales essent dum litigantes mortales sunt" (*y*). The plaintiff and defendant stand before the tribunal,

(*t*) These sections, seeming to contain too elaborate a refutation of Bentham, have been abridged, and thrown into one by the present editor.

(*u*) Aristotle's Politics, bk. 1, ch. 1.

(*x*) 4 Blackst. Comm. 338; Co. Litt. 103 a, 303 b; 6 Co. 9 a, and 45 a; 11 *Id.* 69 a; 3 H. & N. 647.

(*y*) Voet. ad Pand. lib. 5, tit. 1, n. 53; 17 C. B. 140, per Willes, J.

and both individual and social interests require from it a decision, and that too a speedy decision, one way or the other. It will not do for the judge to say, "This matter seems doubtful, I suspend my judgment," and dismiss it, to be renewed indefinitely from time to time; keeping alive all the annoyance and irritation of a law-suit; holding out to each of the parties a manifest temptation to fabricate evidence in order to turn the scale in his favour; and injuring the community by distracting the attention of at least two of its members from the exercise of more useful avocations. All this, however, is very different from adjourning a court for a definite time, for the purposes of justice (*z*).

§ 42. The duty of the legislator, therefore, is not discharged by framing substantive laws and establishing forms of judicial procedure; in order to do complete justice he must go farther, and supply rules for the guidance of tribunals in the *disposal* of all matters of fact which come before them, whatever the nature of the inquiry, or however difficult or even impossible it may be to get at the real truth. In such straits, barbarism and ignorance either decide at haphazard in each particular instance, or dogmatically lay down unbending rules to be applied in all cases, or invoke the aid of superstition, — sometimes, as in the trials by ordeal which have prevailed both in the ancient and modern world, and in the judicial combats of the middle ages, audaciously and impiously calling on Heaven to vindicate the injured party by a miracle; and at others, as in the old system of canonical purgation and the wager of law of our ancestors, unwarrantably assuming that the truth will be extracted, by the oath of the party who is most strongly interested in its concealment (*a*). On the other hand, the laws of countries where the true principles of jurisprudence are understood, meet the difficulty by establishing rules to regulate the burden of proof; or, most usually, to speak with strict accuracy, by attaching an artificial weight to the natural principles by which the burden of proof is governed. This has been well explained by a foreign jurist, in language of which the following is a translation (*b*): "The determining to what extent a certain known element renders probable the existence of such or such an unknown cause, governed, as it neces-

(*z*) R. S. C., Ord. XXXVI. Rule 21.

(*a*) A very good account of these is given by Bonnier, in his Traité des Preuves, §§ 745–750, 2nd Ed. See also 4 Blackst. Comm. ch. 27; Devot. Inst. Jur. Can. lib. 3, tit. 9, § 26, not. (3), and § 30, in notis; and Gibbon's Decline and Fall of the Roman Empire, ch. 38. Besides the absurdity and impiety of these presumptuous appeals to miraculous interposition, there can be little doubt that the danger of them was often evaded by management, so as to be more apparent than real. See a curious instance of this, taken from an ancient ecclesiastical authority, in the Law Magazine, N. S. vol. 1, p. 8.

(*b*) Bonnier, Traité des Preuves, § 710, 2nd Ed.

sarily is, by the light of reason, in general depends wholly on the discrimination of the judge. But in the most important cases the law, desirous of insuring the stability of certain positions, and of cutting short certain controversies, has established PRESUMPTIONS to which the judge is obliged to conform." And in another place (*c*): "It is not always possible for man to arrive at a perfect knowledge of the truth in each particular case, and yet social necessities do not always allow him to suspend his judgment and refrain. The stability of the state of person and property — in a word, the want of peace and security for a multitude of precious interests — compel the legislator to hold as true a great number of points which are not demonstrated, but whose existence is established by an induction more or less cogent. Political order, like social order, rests only on legal presumptions. The capacity of exercising certain rights, discharging certain functions, can be recognised only through the medium of certain conditions determined *à priori, a special verification for each individual instance being evidently impracticable.* The more social relations become complicated, the more it becomes necessary to multiply these presumptions. . . . The motives which have induced the legislator to establish such or such a presumption much more frequently belong to law than to fact. What he chiefly considers is, not whether the known fact combines all the characteristics requisite to render the unknown fact probable, but solely whether social interest requires that, from the proof of the one, the existence of the other ought to be inferred." And a late eminent judge observed in one case (*d*): "The laws of evidence as to what is receivable or not are founded on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters which could by possibility affect it were severally gone into; and inquiries carried on from month to month as to the truth of everything connected with it. I do not say how that would be, but such a course is found to be impossible at present."

§ 43. These *legal* presumptions (*e*) are of two kinds. In most of them the law assumes the existence of something until it is disproved by evidence, — called by the civilians *præsumptiones juris*, or *præsumptiones juris tantùm;* and likewise, by English lawyers,

(*c*) Bonnier, Traité des Preuves, §§ 733, 734, 2nd Ed.

(*d*) Rolfe, B., in *The Attorney-General* v. *Hitchcock*, T., 10 Vict. 11 Jurist, 478, 482; *S. C.*, 1 Exch. 91, 105.

(*e*) There are presumptions of *fact* as well as presumptions of *law*. See *suprà*, pt. 1, §§ 7 and 27, and *infrà*, bk. 3, pt. 2, ch. 2.

inconclusive or rebuttable presumptions. In others, although these are much fewer in number, the presumption is absolute and conclusive, so that no counter-evidence will be received to displace it.[1] These are called *præsumptiones juris et de jure*, — a species of presumption correctly defined, "Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis" (*f*). To this class belong the contract to pay, which the law implies from the purchase of goods; the intent to kill or do grievous bodily harm, implied from the administration of poison, using deadly weapons, &c. Some may be considered as belonging to universal jurisprudence; the principal of which are, the presumption of right derived from the continued and peaceable possession of property, and the presumption upholding the decisions of courts of competent jurisdiction. We have already alluded to the maxim, "Interest reipublicæ ut sit finis litium" (*g*); to which must be added, "Vigilantibus et non dormientibus jura subveniunt" (*h*), and "Ex diuturnitate temporis omnia præsumuntur solenniter esse acta" (*i*). If undisturbed possession for a very long time had not a conclusive effect, the most valuable rights would not only be made the subject of continual dispute, but be liable to be divested or overthrown, when the original evidences of the title to them had become lost or decayed by time (*k*). And accordingly, among the various ways in which property may be acquired, we find both writers on natural law, and the positive codes of nations, recognising that of "prescription;" *i. e.*, uninterrupted user or possession for a period longer or shorter (*l*).

§ 44. So it would be productive of the greatest inconvenience and mischief if after a cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground either of alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflection will

(*f*) Alciatus de Præsumptionibus, pars 2, n. 3; Menochius de Præsumptionibus, lib. 1, quæst. 3, n. 17; 1 Ev. Poth. § 807.

(*g*) *Suprà*, § 41.

(*h*) 2 Co. 26 b; 4 *Id.* 10 b; 82 b; Hob. 347; 2 B. & P. 412; 5 C. B. 74.

(*i*) Co. Litt. 6 b; Jenk. Cent. 1, Cas. 91.

(*k*) "If time," says Lord Plunkett, "destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the lawgiver has placed an hour-glass, by which he metes out, incessantly, those portions of duration which render needless the evidence that he has swept away." — *Lord Brougham's Historical Sketches of Statesmen, &c.*, vol. 2, p. 39, n. — *Life of C. J. Bushe.*

(*l*) Grotius de Jur. Bell. ac Pac. lib. 2, cap. 4; Pufendorf, Jus Nat. et Gent. lib. 4, cap. 12; Dig. lib. 41, tit. 3; Cod. lib. 7, tit. 33; 2 Blackst. Comm. ch. 17; Co. Litt. 113. 114; 1 Greenl. Ev. § 17, 7th Ed.; Grand Coustumier de Normandie, ch. 125; Poth. Obl. pt. 3, ch. 8; Cod. Civil. lib. 3, tit. 20.

[1] For American law, see p. 58.

show, that if *some* point were not established at which judicial proceedings must stop, no one could ever feel secure in the enjoyment of his life, liberty, or property; while unjust, obstinate, and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert it into one vast scene of litigation, disturbance, and ill-will. The great principle of the *finality* of judicial decision is universally recognised, and has been expressed in the various forms, — "Res judicata pro veritate accipitur" (*m*); "Judicium pro veritate accipitur" (*n*); "Interest reipublicæ res judicatas non rescindi" (*o*); "Præsumitur pro justitiâ sententiæ" (*p*); "Sententia facit jus" (*q*); "Infinitum in jure reprobatur" (*r*); "Nemo debet pro unâ causâ bis vexari" (*s*), &c.

§ 45. We will merely add one other instance, which places this matter in the strongest light. If the abstract question were proposed, "What is the most *unjust* thing that could be done?" the answer probably would be, "The punishing a man for disobeying a law with the existence of which he was not acquainted." And yet that must constantly occur everywhere; there being no rule of jurisprudence more universal than this, that every person in a country must be conclusively presumed to know its laws sufficiently to be able to regulate his conduct by them (*t*), — "Ignorantia juris, quod quisque tenetur scire, neminem excusat" (*u*). Hard as this may seem, it is indispensably necessary in order to prevent infinitely greater evils; for the allowing violations of the criminal, or contraventions of the civil code to pass without punishment or inconvenience, under the plea of ignorance of their provisions, would render the whole body of jurisprudence practically worthless. If none were amenable to the laws but those who could be proved to be acquainted with them, not only would ignorance be continually pleaded, in criminal cases especially, but persons would naturally avoid acquiring a knowledge which carried such perilous consequences along with it.

§ 46. But if artificial presumptions have their use, they have likewise their abuse. In unenlightened times, or in the hands of

(*m*) Dig. lib. 50, tit. 17, l. 207; Mascard. de Prob. Concl. 1237, n. 13; 1 Ev. Poth. pt. 4, ch. 3, sect. 3, art. 3, § 37; Co. Litt. 103 a, and 186 a; n. (3), by Hargr.

(*n*) Co. Litt 39 a, 168 a, 236 b; 2 Inst. 380.

(*o*) 2 Inst. 360.

(*p*) Mascard. de Prob. Concl. 1237, n. 2. See 3 Bulst. 42, 43.

(*q*) Ellesm. Postn. 55.

(*r*) 2 Inst. 340; 6 Co. 45 a; 8 *Id.* 168 b; 12 Co. 24; Hob. 159; Jenk. Cent. 2, Cas. 15; Cent. 4, Cas 2 and 46; and Cent. 8, Cas. 29.

(*s*) Jenk. Cent. 1, Cas. 38; 5 Co. 6 a. As to new trials in the U. S., see Morgan's Best, 52.

(*t*) Dig. lib. 22, tit. 6, l. 9; Heinec. ad Pand. pars 4, § 146; Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 13; Doctor and Student, Dial. 1, c. 26; and see post, § 336.

(*u*) 4 Blackst. Comm. 27.

a corrupt tribunal, they are most dangerous instruments; and even in the best times, and by the best tribunals, they require to be handled with discretion. Some very absurd and mischievous presumptions of this kind are to be found in the works of the civilians (*x*), as well as in the laws of modern France (*y*); and in this country juries have been frequently advised, if not directed, by judges, to presume the grossest absurdities under colour of advancing justice (*z*). A well-known instance of an extremely violent and harsh presumption is to be found in the statute 21 Jac. 1, c. 17; by which it was enacted, that every woman delivered of bastard issue, who should endeavour privately, either by drowning or secret burying, or in any other way, to conceal the death thereof, so that it might not come to light whether it were born alive or not, should be deemed to have murdered it, unless she proved it to have been born dead. This cruel enactment, which seems to have been copied from an edict of Hen. II. of France in 1556 (*a*), the principle of which is also to be found in the laws of some other countries (*b*), has been repealed by the 43 Geo. 3, c. 58, s. 3. The conclusive effect formerly ascribed to the confessions of accused persons (*c*), and to attempts by flight to escape judicial inquiry (*d*), are likewise among the most general instances.

§ 47. There are some exclusionary rules connected with this branch of the subject, the absolute necessity for which it would require extreme hardihood to deny. We mean where evidence is excluded on the ground that its production would cause needless vexation, expense, or delay (*e*). In illustration of the two former, the following case has been put (*f*): "By laying a barrow full of rubbish on a spot on which it ought not to have been laid (the side of a turnpike road), Titius has incurred a penalty of 5*s*. No man was witness to the transaction but Sempronius; and in the station of writer, Sempronius is gone to make his fortune in the East Indies. Should Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting

(*x*) See Struvius, Syntagma Juris Civilis by Müller, Exercit. 28, § xviii., n. (ζ). "Idem dico," says Bartolus, "si aliquis deprehenditur in domo alicujus, ubi pulchra mulier est, certè facit hunc adulterium manifestum:" Comment. in 2dam part. Dig. Nov. 111 b, Edit. Lugd. 1581.

(*y*) See Bonnier, Traité des Preuves, § 752 *et seq.*; 2nd Ed.

(*z*) See *infrà*, bk. 3, pt. 2, ch. 2.

(*a*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6; Préambule, n. (*a*); and *Id.* sect. 4, § 2, n. (*b*).

(*b*) 4 Blackst. Comm. 198.

(*c*) See bk. 3, pt. 2, c. 7.

(*d*) See bk. 3, pt. 2, c. 2.

(*e*) Bentham, whose work on Judicial Evidence is a professed attack on artificial systems of proof in general, admits that the most legitimate evidence may be rightly rejected on these grounds, even at the risk of doing injustice. See vol. i. p. 31; vol. iv. p. 115; and bk. 9, pt. 2, cc. 1, 2, 3, 4.

(*f*) 4 Benth. Jud. Ev. 479, 480.

Titius to this penalty? Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius, or anybody else, to the expense?" Again, while the liberty of adducing evidence to support his cause ought to be most freely conceded to every litigant, — "Facultas probationum non est angustanda" (*g*), — that liberty might be so grossly abused as to stop the administration of justice; and a power in all tribunals to restrain it within due bounds is consequently as essential to the proper discharge of their functions as the right of expunging surplusage in forensic documents, and restraining prolixity in pleading. "Excessus in re qualibet jure reprobatur communi" (*h*). Suppose a man sued for a debt, or an injurious act of the simplest and most ordinary kind, were to pretend that he required for his defence the evidence of some hundreds of witnesses living in remote and different parts of the world, a court is surely not bound to take his word or his oath for the truth of this, or even for his bona fides in asserting it. Accordingly, in the judicial practice of this country, a commission or mandamus to examine witnesses will be refused, or terms will be imposed on the party making the application, if the judges think, in their discretion, that the application for it is made with a view to vexation or delay, or with any other sinister or improper motive (*i*). So, we apprehend, a power (to be exercised with great caution, no doubt) is vested in every tribunal, of refusing to hear evidence obviously tendered for such purposes (*k*). "Quanquam," says the Digest, "quibusdam legibus amplissimus numerus testium definitus sit: tamen ex constitutionibus Principum hæc licentia ad sufficientem numerum testium coarctetur, ut judices moderentur, et eum solum numerum testium, quem necessarium esse putaverint, evocari patiantur; ne effrenatâ potestate ad vexandos homines superflua multitudo testium protrahatur" (*l*). Still, in all these cases, the evidence offered might really be relevant and important, and injustice might be done by its rejection.

§ 48. The lawgivers of some countries, sensible of the evils that may be occasioned by malpractices like the above, have, in endeavouring to suppress them, run into positive absurdity. We allude to the

(*g*) 4 Inst. 279. See also Cod. lib. 1, tit. 5, l. 21, *vers. fin.*

(*h*) 2 Inst. 107 and 232; 11 Co. 44.

(*i*) *Pirie* v. *Iron*, 8 Bingh. 143.

(*k*) In the Irish State Trials of 1843, the defendants were indicted for a seditious conspiracy, and among the overt acts were laid the holding in different parts of that kingdom what were called "monster meetings;" *i. e.*, meetings at each of which several hundreds of thousands of persons were present. In order to prevent the case ever getting to the jury, it was, as we are informed, suggested to the defendants, that under pretence of showing that those meetings were not of a seditious character, they might call as witnesses every one of the persons present at them. This dishonourable mode of defence was not resorted to; but suppose it had been, must the court and jury have submitted to it?

(*l*) Dig. lib. 22, tit. 5, l. 1, § 2.

practice of limiting by law the number of witnesses that may be called in proof of each fact in dispute (*m*), without regard to the nature of the cause, the probity of the witnesses, the quantity of evidence given by them, or their manner of delivering their testimony, — things which it would obviously be impossible to define by any rule laid down beforehand.

§ 49. Another marked feature by which judicial proof is distinguished from other forms of proof is, that the legislator by whom its rules are framed must look beyond the contending parties in each case, and weigh the consequences to society which may follow from the decisions of tribunals. Thus the mischiefs which arise from a blamable passiveness in the law are not usually so great as those which spring from its misguided action. For instance, the condemnation and punishment of an innocent man for a supposed crime, and the acquittal of a guilty one, are, philosophically speaking, only modes of misdecision, diverging equally from the truth. But a very little reflection will show that, taken with their consequences, the former is incalculably the greater evil; and the legislators and jurists of almost every age and country have recognised the principle, — however violated in practice, — that, although the punishment of guilt and the protection of innocence have in general an equal claim in the administration of justice, the latter should be the primary care of the law; and consequently that in matters of doubt it is safer to acquit than to condemn. It is worthy of observation, that, although the principle in question was fully recognised by the civilians and canonists, they reversed the rule in those cases where innocence chiefly requires protection; and their maxim — "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi" (*n*) — will remain a lasting monument of the barbarity as well as the imbecility of its framers. Nor are these merely the notions of bygone ages. In a very recent treatise on the canon law is the following passage: "Plus præstant præsumptiones in causis civilibus, quam in criminalibus, in quibus nemo ex solis conjecturis, etiam vehementibus, condemnandus est; excepto crimine hæreseos, cujus suspectus tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit" (*o*). The English law goes farther in the opposite direction than

(*m*) 5 Benth. Jud. Ev. 521; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3, § xvi. Note (*x*), *vers. fin.*; Devot. Inst. Canon. lib. 3, tit. 9, § 9; Decretal. Greg. IX. lib. 2, tit. 20, c. 37. "To any given fact or question (*fait* (fact), French: *pregunta* (question), Spanish), thirty witnesses were and are allowed by Spanish law; ten only are, or at least were, allowed in French law. Are both right? One French witness, then, is equal to three Spanish ones: " Benth. *in loc. cit.*

(*n*) Beccaria, Dei Delitti e delle Pene, § 8, in n.; see also Mascard. de Prob. Concl. 1392, n. 13; Burnett's Crim. Law of Scotland, 612.

(*o*) Devot Instit. Canon. vol. 2, p. 116, Paris. 1852. Superiorum facultate.

that of most other countries, for it lays down as a maxim, that it is better several guilty persons should escape than that one innocent person should suffer (*p*). The salutary fruit of this is, that in no part of the world is genuine voluntary evidence against suspected criminals more easily procured than in England; the persuasion being general throughout society, that if a suspected man be really innocent, the law will take care that no harm shall happen to him. The principles on which this noble and politic maxim rests are not, however, generally understood. The strongest proof of this is to be found in the singular fact of its having been formally attacked by the celebrated Dr. Paley, in his "Moral and Political Philosophy," bk. 6, ch. 9, who designates it a popular maxim, having a considerable influence in producing injudicious acquittals. "When certain rules of adjudication must be pursued," he argues, "when certain degrees of credibility must be accepted, in order to reach the crimes with which the public are infested, courts of justice should not be deterred from the application of these rules, by *every* suspicion of danger, or by the mere possibility of confounding the innocent with the guilty. They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upheld." It will not, however, be difficult to expose the fallacy of this pernicious and inhuman argument. It is perfectly true that the security of civil life is the first object of all penal laws, and that that security is chiefly protected by the dread of punishment; but then it is of punishment *as a consequence of guilt*, and not of punishment falling indiscriminately on those who have or have not provoked it by their crimes. When the guilty escape, the law has merely failed of its intended effect; but when the innocent become its victims, it injures the very persons it was meant to protect, and destroys the security it was meant to preserve. Nor is this all, or even the worst; for it is a great mistake to suppose that the actual wrong and violence done to the innocent man are the *only* evils resulting from an erroneous conviction. Confidence in the administration of justice must necessarily be shaken when people reflect, and can truly reflect, that every individual they see condemned to punishment may be in the highest degree unfortunate, and in no degree guilty, his sufferings being inflicted merely as a sacrifice to a supposed expediency. Under such a system, few would care to prosecute for offences, still fewer to come forward with voluntary testimony against persons accused or suspected of them. The law might, indeed, sit in terrific majesty

(*p*) 2 Hale, P. C. 289; 4 Blackst. Comm. 358.

denouncing the severest penalties, and acting on the most sanguinary and strained maxims; but for want of proofs and co-operation on the part of society, those penalties would soon become a dead letter. It requires strong imaginative powers to see an analogy between the fate of a soldier dying in the defence of his country, and that of an innocent victim butchered in cold blood under the name of justice. The one falls with honour, his memory is respected, his family, perhaps, provided for; while the latter has not even the sad consolation of being pitied, but sees himself branded with public ignominy, and leaves a name which will excite nothing but horror or detestation; until, perhaps, in course of time, his innocence becomes manifest, only to awaken in all the right-minded portion of the community a feeling of alarm and disgust at the state of insecurity under which they live. "Could the escape of ten of the most desperate criminals," emphatically asks Sir Samuel Romilly, in his "Observations on the Criminal Law of England, &c.," — from which some of the preceding remarks have been taken, — "have ever produced as much mischief to society as did the public executions of Calas, of D'Anglade, or of Le Brun?" — three celebrated cases which occurred in France, and show the fearful state into which the administration of justice had fallen under the *ancien régime* in that country. But another evil, which seems to have altogether escaped the notice of Dr. Paley, remains to be mentioned. "Instances," observes Sir Samuel Romilly, "have indeed occurred like that of Calas, where a man has been offered up as a sacrifice to the laws, though the laws had never been violated; where the tribunals have committed the double mistake of supposing a crime where none had been committed, and of finding a criminal where none could exist. These, however, are very gross, and therefore very rare examples of judicial error. In most cases the crime is ascertained, and to discover the author is all that remains for investigation; and, in every such case, if there follow an erroneous conviction, a twofold evil must be incurred, *the escape of the guilty as well as the suffering of the innocent.* Perhaps amidst the crowd of those who are gazing upon the supposed criminal, when he is led out to execution, may be lurking the real murderer, who, while he contemplates the fate of the wretch before him, reflects with scorn upon the imbecility of the law, and becomes more hardened, and derives more confidence, in the dangerous career on which he has entered" (*q*).

Again, the laws of every country suppress much evidence that would be relevant or even conclusive, where its reception would involve the disclosure of matters of paramount importance, which

(*q*) See further on this subject, *infrà*, bk. 1, pt. 1.

public policy and social order require to be concealed; such as secrets of state, communications made in professional confidence, and others (*r*).

§ 50. Another great difference between legal and historical evidence lies in the securities for truth, and the sources of danger and deception peculiar to each. Posterity and future ages are not unfrequently spoken of as a tribunal to whose judgment appeals may be made from the decisions of the present; and, viewed as a figure of speech, there is no impropriety in this. But figures must not be mistaken for facts. The tribunal of posterity differs immensely from all others; for it is one of unlimited jurisdiction, both judicial and inquisitorial: it is ever sitting, ever investigating, ever judging; barred by no prescription, bound by no estoppel, and responsible to no human authority. The securities for the truth of the records and traditions of the past, which time has brought down to us, consist in the multitude of sources to which they can be traced, the large number of persons whose interest it has been to preserve them from oblivion and corruption: above all, the *permanent effects* of events, visible in the shape of monuments and other pieces of real evidence (*s*), customs, ceremonies, and the like; and, finally, the actors in the scene having passed away, there is rarely either opportunity or interest to fabricate evidence, in furtherance of their views or justification of their conduct. Now, in the case of a legal investigation before a judicial tribunal, properly so called, all this is reversed. The judge or jury, as the case may be, must decide once for all on such evidence as may come before them; the facts — the res gestæ of the dispute — are known but to few, and are matter of interest to fewer; while the parties who are best acquainted with the truth stand in a hostile position to each other, and have a stake at issue which places them under the strongest temptation to misrepresent it. Hence it is obvious, that without peculiar guarantees for the veracity and completeness of the evidence adduced in courts of justice, they would, when investigating disputed facts, be exposed to the same risks of error as the historian, without the safeguards which he possesses, —

(*r*) See *infrà*, bk. 3, pt. 2, ch. 8.

(*s*) The following passage is taken from a review in the "Examiner" newspaper of Laing's "Descriptive Catalogue of Impressions from antient Scottish Seals," December 28th, 1850: "Seals and coins may be considered as bottles filled with memoranda, and cast upon the ocean of time by the earlier mariners for the use of those who came after them. Their forts, their factories, their lighthouses, have many of them disappeared; but the bottles are perpetually being found after many days. . . . Many an obscure allusion in ancient authors has been illuminated by the pure ray serene emitted by a graven gem. The scholar will often find sermons in these stones, excelling the lucubrations of the commentators no less in clearness than in terseness; and he may sometimes be put right by a scarabæus, when a scholiast has failed him."

in a word, the legislator dealing with judicial evidence is bound to frame characteristic securities to meet characteristic dangers.

§ 51. This distinction between historical and legal proof may be illustrated by the consideration of derivative, or second-hand, evidence. The infirmity of this kind of proof has been already pointed out (*t*), and indeed is one of those self-evident things to which the mind of man at once assents. It is equally clear that the farther evidence is removed from its primary source, the weaker it becomes; thus hearsay evidence becomes more suspicious and dangerous according as it is reported at second, third, fourth, or fifth hand. And yet, in inquiring into the events of past ages, it is scarcely possible to move a step without resorting to this kind of evidence. Supposing that the events, sacred and profane, which took place in the first year of the Christian era existed solely in oral tradition, and taking a generation to last thirty years, the account which persons at the commencement of the present century had of those events would seem to have come to them by hearsay at the *sixtieth* hand, — evidence, the value of which in a court of justice would be rightly estimated at zero, if not below it. And although the fact that accounts of many of those events have been committed to writing affords a better security for their truth, still the genuineness of the documents in which they are recorded rests, in part at least, on oral tradition. But it is a great mistake to suppose that the real probative force of the evidence of those facts which we possess in the present century rises no higher than this reasoning would indicate. The fallacy consists in treating each generation as *one* single person, by whom a bare relation of the fact has been handed down to the next, instead of as consisting of a number of persons interested in ascertaining its truth; and in wholly overlooking the corroborative proofs supplied by permanent memorials and the acts of men. In short, as a modern historian has well expressed it (*u*), "The presumption of history, to whose mirror the scattered rays of moral evidence converge, may be irresistible, when the legal inference from insulated actions is not only technically, but substantially, inconclusive."

§ 52. The offering to prove a historical fact by derivative evidence affords, therefore, not the slightest presumption of unfairness; unless when the evidence is, on its face, a substitute for some other which might have been procured (*x*). But derivative evidence offered in a

(*t*) *Suprà*, pt. 1, § 30.

(*u*) Hallam's Constitutional History of England, vol. 2, p. 106, 7th Ed.

(*x*) Gibbon, who was not a lawyer, thus expresses himself in the Preface to the fourth volume of his History of the Decline and Fall of the Roman Empire. "I have always endeavoured to draw from the

court of justice, in proof of *recent* events, by a litigant party whose avowed object is to obtain a decision in his own favour, carries so strong an appearance of fraud that the laws of most nations either reject it, or look upon it with suspicion (*y*). The English law in general rejects it, but reverses the rule in many cases where the matter to be proved has taken place so long ago that the original evidence is manifestly unattainable, and thus far partakes of the nature of a historical fact (*z*).

§ 53. The greatest misconceptions and errors have arisen from confounding legal with philosophical and historical evidence. There is a well-known anecdote of Sir Walter Raleigh which will serve to illustrate this. While a prisoner in the Tower, composing his History of the World, a disturbance arose under his window, and being unable to ascertain its merits through the conflicting accounts which reached him, he is said to have uttered an exclamation against the folly of relying on narrations of the events of past ages, when there is so much difficulty in arriving at the truth of those happening immediately around us (*a*). But in that investigation he was discharging a quasi-judicial function, without the compulsory powers possessed by courts of justice for extracting truth, and labouring under the further disadvantage of imprisonment; while in dealing with the events of past ages he had the benefit of the securities for historical truth already described (*b*). Nowhere, however, are the consequences of confounding the two kinds of evidence so visible as in Bentham's work on Judicial Evidence. He entertains the most erroneous notions as to the nature and use of the rules which regulate the burden of proof (*c*), and seems to consider every issue raised in a court of justice as a philosophical question, the actual truth of which is to be ascertained by the tribunal at any cost; or, should this be impracticable, then that a decision is to be given founded on the best guess that can be made at it. Thus, speaking of the laws which require a plurality of witnesses in certain cases, he says (*d*): "Every man is excluded, — every man, be he who he may, unless he comes with another in his hand. Two propositions are here assumed: all men are liars, and all judges fools. Without the second, the first would be insufficient." The illogical character of

fountain-head; my curiosity, as well as a sense of duty, has always urged me to study the originals; and if they have sometimes eluded my search, I have carefully marked the *secondary* evidence, on whose faith a passage or a fact were reduced to depend."

(*y*) *Infrà*, bk. 1, pt. 2; and bk. 3, pt. 2, ch. 4.

(*z*) *Infrà*, bk. 3, pt. 2, ch. 4.

(*a*) Barrow's History of Ireland, vol. 1, pp. 25, 26.

(*b*) *Suprà*, §§ 50, 51.

(*c*) See 1 Benth. Jud. Ev. 36.

(*d*) 4 *Id.* 503. See also 5 *Id.* 463, 464

this reasoning is obvious at a glance. What the law says in such cases is this, — the witness *may* be a liar, and the judge *may* be a fool; and the mischief which might be caused by the folly of the one, set in motion by the mendacity of the other, would so greatly exceed any advantage that could result from a decision based on their united veracity and wisdom, that for the benefit of the community we arrest the inquiry.

§ 54. The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in courts of justice, vary, as might be expected, in different countries, and with the systems of law to which they are attached. Several of those principally relied on by the English law, such as the publicity of judicial proceedings, the compulsory presence of witnesses in open court, the right of cross-examination, &c., will be considered in their place (*e*); for the present, we will merely point attention to a few which, either from their value or general adoption, deserve particular notice.

§ 55. To the three sanctions of truth which have been described in the preceding part of this Introduction (*f*), the municipal laws of most nations have added a fourth; which may be called the *legal* or *political* sanction (*g*), and consists in rendering false testimony an offence cognisable by penal justice. The punishment of this offence has varied in different ages and places. At one time in this country the punishment was death. By a still unrepealed Act of Elizabeth, 5 Eliz. c. 9, the punishment is a fine of 20*l*., and in default of payment of the fine, the pillory, where the offender is directed to have "bothe his eares nayled." The same statute also disabled the offender from giving any evidence in future for ever, and also gave one half of the penalty to the party grieved by the offence. The pillory has been abolished by 7 W. 4, and 1 Vict. c. 23, and the disability to testify has been generally considered to be abolished by 6 & 7 Vict. c. 85 (*h*); but the right of the party grieved to recover half the penalty — which, looking to the changed value of money since the time of Queen Elizabeth, seems very inadequate — appears still to subsist. The present punishment is that provided by 2 Geo. 2, c. 25, s. 2, as amended by the Penal Servitude Acts; that is, not more than seven years' penal servitude or imprisonment, "besides the punishment"

(*e*) *Infrà*, bk. 1, pt. 1.

(*f*) *Suprà*, pt. 1, §§ 16 *et seq.*

(*g*) 1 Benth. Jud. Ev. 198, 221.

(*h*) There is no express exception for a conviction of perjury in 6 & 7 Vict. c. 85, which enables any person to give evidence, notwithstanding that he may have been previously convicted of any crime or offence, but neither has there been any express repeal of 5 Eliz. c. 9.

theretofore "to be inflicted for such great crimes." The exact words of this enactment are these: —

"The more effectually to deter persons from committing wilful and corrupt perjury, be it further enacted, that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury or subornation of perjury according to the laws now in being, to order such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour during all the said time, and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, *shall suffer death as a felon without benefit of clergy* (*h'*), and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended."

A most important Act, passed twenty years afterwards (23 Geo. 2, c. 11), was re-enacted with amendments in 1851 by 14 & 15 Vict. c. 100, s. 19. By virtue of the latter enactment, any judge of the High Court, recorder, chairman of Quarter Sessions, judge of a county court or any court of record, or justices of the peace, in special or petty sessions may, "if it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, or other proceeding, direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution." A power of commitment, *then and there*, is also given, which may be exercised by the court unless the party enter into a recognisance with one or more sureties to appear and take his trial at the next assizes. It is believed that this summary and exemplary power is but seldom exercised, notwithstanding the frequency of the cases in which apparent perjury is committed (*h''*).

It may perhaps be even suggested, that in lieu of the power of commitment, the judge before whom perjury appears clearly to have been committed, may *himself* be invested with the power of sentencing

(*h'*) The effect of 4 & 5 W. 4, c. 67, as read with the Penal Servitude Acts, appears to be to substitute penal servitude for life for capital punishment.

(*h''*) See "Law Journal" newspaper for 1892, pp. 335, 346, and 359, in which the refusal of a county court judge to exercise his summary power, under the Act, is commented on, and it is suggested that the Act requires amendment by a provision for the court of commitment sending to the court of trial some materials, as a substitute for depositions, upon which the court of trial may charge the jury. "At present," it is there stated, "the judge of assize complains that he has no material before him on which he can charge the grand jury, and no means of testing the evidence for the prosecution by comparison with the previous statements of witnesses."

the offender to some punishment *forthwith*, or otherwise to be transported to some of His Majesty's plantations beyond the seas, for a time not exceeding seven years, as the court shall think proper; and thereupon judgment shall be given that the person convicted shall be committed or transported accordingly, over and above such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is, or shall be, provided by law for the transportation of felons.

The present maximum punishment, of seven years' penal servitude, is but rarely inflicted. In one celebrated case, however, that of *Reg.* v. *Castro, otherwise Orton, otherwise Sir R. C. D. Tichborne, Bart.*, the defendant was sentenced to two terms of penal servitude of seven years each, the second to begin at the end of the first, upon an indictment containing two counts charging perjury on two different occasions with the same object, and the correctness of this sentence in point of law was upheld by the House of Lords (*h'''*).

§ 56. The next security is a very remarkable one, and consists in requiring evidence in courts of justice to be given *on oath*, — according to the maxim, "In judicio non creditur nisi juratis" (*i*). Oaths, however, it is well known, are not peculiar to courts of justice, nor are they even the creatures of municipal law, — having been in use before societies were formed or cities built, and the most solemn acts of political and social life being guarded by their sanction: "Non est arctius vinculum inter homines quàm jusjurandum" (*k*). And, however abused or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct or as a guarantee for the veracity of narration.

§ 57. An oath is an application of the religious sanction: "Jurare est, Deum in testem vocare, et est actus divini cultûs" (*l*). It is calling the Deity to witness in aid of a declaration by man (*m*), and

(*h'''*) *Castro* v. *The Queen*, 6 App. Cas. 229; 50 L. J., Q. B. 497. For the history of this case, in which the defendant swore that he was Sir R. Tichborne, with the object of obtaining possession of the Tichborne estates, see the preamble to "The Tichborne and Doughty Estates Act, 1874," 37 & 38 Vict. c. 7.

The defendant was committed for trial by Bovill, C. J., on the trial of the action of ejectment in which he gave evidence as claimant of the estates.

(*i*) Cro. Car. 64. See also 3 Inst. 79.

(*k*) Jenk. Cent. 3, Cas. 54.

(*l*) 3 Inst. 165. In some countries witnesses were required to give their evidence *fasting*. Devot. Inst. Canon. lib. 3, tit. 9, § 12, n. (1)

(*m*) "Le serment est l'attestation de la Divinité à l'appui d'une déclaration de l'homme. Ce témoignage de la croyance des peuples à une justice suprême, se retrouve dans tous les pays et dans tous les temps. Pythagore prétendait même que le monde devait son origine à un serment que Dieu lui-même aurait prêté de toute éternité, et dont la création serait l'accomplissement. On sent bien que cette explication, comme

consequently does not depend for its validity on the *peculiar* religious opinions of the person by whom it is taken. The Roman emperor, we are told, "jurejurando quod propriâ superstitione juratum est, standum rescripsit" (*n*); and Lord Chief Justice Willes, in his celebrated judgment in *Omichund* v. *Barker* (*o*), expresses himself as follows: "Oaths were instituted long before Christianity, were made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. 'Juramentum nihil aliud est quam Deum in testem vocare;' and therefore nothing but the belief in a God, and that He will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. The forms, indeed, of an oath have been always different in all countries, according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is, that God in all of them is called upon as a witness to the truth of what we say."

§ 58. There is this important distinction among oaths, — that many, besides invoking the attestation of a Superior Power, place in the mouth of the swearer a formula, by which he imprecates divine vengeance on himself if his testimony be untrue. One of the forms in use among the ancient Romans is thus described: "Lapidem silicem tenebant juraturi per Jovem, hæc verba dicentes, 'Si sciens fallo, tum me Diespiter salvâ urbe arceque bonis ejiciat, ut ego hunc lapidem'" (*p*); and formerly an imprecation formed part of the judicial oath in France (*q*). Some eminent authorities in our own law have used language calculated to convey the notion that oaths are necessarily imprecatory. Thus in Queen Caroline's case (*r*), Lord Chief Justice Abbott, when delivering the answer of the judges to a question put by the House of Lords, says: "Speaking for myself, not meaning thereby to pledge the other judges, though I believe their sentiments concur with my own, I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the divine vengeance upon his head if what he shall

la plupart de celles que donne la philosophie sur le mystérieux problème de l'origine du monde, est plus obscure que le fait même à expliquer." — *Bonnier, Traité des Preuves,* § 340, 2nd Ed.

(*n*) Dig. lib. 12, tit. 2, l. 5, § 1.

(*o*) Willes, 545 *et seq.* The case is also reported, 1 Atk. 49, nom. *Omychund* v. *Barker.*

(*p*) Festus, de Verbor. Signif. lib. 10, voc. "Lapidem;" and the custom is alluded to by Cicero, Epist. ad Divers. lib. 7, epist. 1; and by Aulus Gellius, Noct. Attic. lib. 1, c. 21. See also 1 Greenl. Ev. § 328, note, 7th Ed.

(*q*) Bonnier, Traité des Preuves, § 352, 2nd Ed.

(*r*) 2 Brod. & B. 285.

afterwards say is false." In *Rex* v. *White* (*s*), also, the court said, "An oath is a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of Heaven, if he do not speak the truth." Imprecation is, however, no part of the essence of an oath, but is a mere adjunct, of questionable propriety, as calculated to divert attention from the true meaning of the ceremony, and fix it on some external observance. "An oath," says Pufendorf (*t*), "is a religious asseveration, by which we renounce the divine mercy, or invoke the divine vengeance upon us, unless we speak the truth. That this is the meaning of oaths is apparent from the forms in which they are usually couched, as, for instance, 'So help me God,' 'God be my witness,' 'God be my avenger,' or equivalent expressions which amount to nearly the same thing. For when we call to witness a superior who has a right to inflict punishment on us, we by this act desire of him to avenge perfidy; and the Being who knows all things is the avenger of crime by the being witness to it. Now the loss of the favour of God is in itself an extremely severe punishment." A modern canonist defines an oath, "Affirmatio religiosa, hoc est, advocatio Divini Numinis in testem ejus rei, quæ promittitur aut asseritur" (*u*); and the Roman law truly laid down, "Jurisjurandi contempta religio satis Deum ultorem habet" (*x*).

§ 59. The utility of oaths in any shape has been strongly questioned (*y*). The good man, it is sometimes said, will speak the truth without an oath, while the bad man mocks at its obligation. To this the following answer has been given (*z*): "It must be owned great numbers will certainly speak truth without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort, — neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned as to violate a more solemn engagement. Accordingly, we find by experience that many will boldly say what they will by no means adventure to swear; and the difference which they make between these two things is often

(*s*) 1 Leach, C. L. 430.

(*t*) De Jur. Nat. et Gent. lib. 4, c. 2, § 2. "Est autem jusjurandum assertio religiosa, quâ divinæ misericordiæ renunciamus, aut divinam pœnam in nos deposcimus, nisi verum dicamus. Hunc enim juramentorum sensum esse, facile indicant formulæ, quibus illa concipi solent; puta, *Ita me Deus adjuvet Deus sit testis, Deus sit vindex*, aut his æquipollentes; quæ eodem ferè recidunt. Quando enim superior puniendi jus habens testis advocatur, simul ab eodem perfidiæ ultio petitur; et qui novit omnia ultor est, quia testis. In hoc ipso autem gravissima pœna est, si quem Deus propitius mortalem non adjuvet."

(*u*) Devot. Inst. Canon. lib. 3, tit. 9, § 23.

(*x*) Cod. lib. 4, tit. 1, l. 2.

(*y*) Benth. Jud. Ev. bk. 2, ch. 6.

(*z*) Archbishop Secker, as cited in Ram on Facts, 211, 212.

indeed much greater than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, and, as the Scripture phrase is, have bound their souls with a bond (Numb. xxx. 2), it composes their passions, counterbalances their prejudices and interests, makes them mindful of what they promise, and careful what they assert; puts them upon exactness in every circumstance: and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act."

The chief arguments brought against oaths, however, are founded on their abuses. One of the greatest of these is *the investing oaths with a conclusive effect*, — where the law announces to a person whose life, liberty, or property is in jeopardy, that in order to save it he has only to swear to a certain indicated fact. This was precisely the case of the wager of law anciently used in England (*a*), and the system of purgation under the canon law (*b*). So, in the civil law, either of the litigant parties might in many cases tender an oath, called the "decisory oath," to the other; who was bound, under peril of losing his cause, either to take it, in which case he obtained judgment without further trouble, or refer it back to his adversary, who then refused it at the like peril, or took it with the like prospect of advantage. The judge also (be it remembered there was no jury) had a discretionary power of deciding doubtful cases by means of another oath, called the "suppletory oath," administered by him to either of the parties (*c*). With reference to these, one of the greatest foreign authorities, who to the learning of a jurist added the practical experience of a judge, expressed himself as follows (*d*): "I would advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of

(*a*) 3 Blackst. Comm. 341.

(*b*) Devot. Inst. Canon. lib. 3, tit. 9, § 26, n. 3; 4 Blackst. Comm. 368.

(*c*) See on the subject of these oaths, Dig. lib. 12, tit. 2; Cod. lib. 1, tit. 1; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 6; 1 Ev. Poth. Oblig. part 4, ch. 3, sect. 4; Bonnier, Traité des Preuves, §§ 338–378, 2nd Ed.; Calvin, Lexic. Jurid. voc. "Juramentum," et "Jurisjur. Usus;" Devot. Inst. Canon. lib. 3, tit. 9, §§ 23 *et seq.*

(*d*) 1 Ev. Poth. § 831. With the exception of those cases in which a defendant was allowed to wager his law, abolished by 3 & 4 Will. 4. c. 42, the common law of England, as is well known, always rejected the decisory and suppletory oaths of the civilians. In France the *decisory* oath is not allowed in criminal cases: Bonnier, Traité des Preuves, § 342, 2nd Ed., who says, § 360, that its use in such cases may be considered as having completely disappeared among modern nations. Both in France and by the modern canon law, the *suppletory* oath is confined to civil cases: *Id.* § 378, and Devot. Inst. Canon. lib. 3, tit. 9, § 26.

incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted" (*d'*). Another great abuse of oaths is their *frequency*. Formerly a system of wholesale swearing pervaded every part of the administration of this country: it was observed, "a pound of tea cannot travel regularly from the ship to the consumer, without costing half a dozen oaths at the least" (*e*); and nothing was more common than for persons to go before magistrates, and take voluntary oaths on the most trivial occasions. The taking of oaths before justices of the peace in matters wherein they have no jurisdiction is prohibited by the Statutory Declarations Act, 1835 (*f*), which statute substitutes a declaration for an oath in many proceedings of an extrajudicial nature (*g*).

§ 60. Another security for the truth of evidence, and check on the action of fraud and perjury, consists in the establishment by law of prescribed forms, to be observed when *pre-appointed* evidence is employed. Of these the principal and most universal is that derived from the use of *writing*. The superiority in permanence, and in many respects in trustworthiness, of written over verbal proofs, must have been noticed from the earliest times, — "vox audita perit; litera scripta manet." The false relations of what never took place; and, even in the case of real transactions, the decayed memories, the imperfect recollections and wilful misrepresentations of witnesses; added to the certainty of the extinction, sooner or later, of the primary source of evidence by their death, — all show the wisdom of providing some better, or at least more lasting, mode of proof for matters which are susceptible of it, and are in themselves of sufficient consequence to overbalance the trouble and expense of its attainment. "La force des preuves par écrit," says Domat (*h*), "consiste en ce que les hommes sont convenus de conserver par l'écriture le souvenir des choses qui se sont passées, et dont ils ont voulu faire subsister la mémoire, soit pour s'en faire des règles, ou pour y avoir une preuve perpétuelle de la vérité de ce qu'on écrit. Ainsi, on écrit les Conventions, pour conserver la mémoire de ce qu'on s'est prescrit en contractant, et pour se faire une loi fixe et immuable de ce qui a été convenu. Ainsi, on écrit les Testamens, pour faire subsister le souvenir de ce qu'a ordonné celui qui avait le

(*d'*) See further s. 166, post, where the conviction of the "long judicial experience" of "J. M." is cited to the same effect.

(*e*) Paley's Moral and Political Philosophy, bk. 3, pt. 1, ch. 16.

(*f*) 5 & 6 Will. 4, c. 62, s. 13.

(*g*) As to *promissory oaths*, see 31 & 32 Vict. c. 72.

(*h*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 2. See *infrà*, bk. 2, pt. 3, ch. 1.

droit de disposer de ses biens, et en faire une règle à son héritier et à ses légataires. Ainsi, on écrit les Sentences, les Arrêts, les Edits, les Ordonnances, et tout ce qui doit tenir lieu de titre ou de loi. Ainsi, on écrit dans les Registres publics les Mariages, les Baptêmes, les actes qui doivent être insinués; et on fait d'autres semblables registres, pour avoir un dépôt public et perpétual de la vérité des actes qu'on y enregistre. . . . L'écrit conserve invariablement ce qu'on y confie, et il exprime l'intention des personnes par leur propre témoignage." In accordance with these principles, the policy of the common law of England requires that the proceedings of Parliament and the higher courts of justice, and some other public matters of great weight and importance, shall be preserved in written records; and that many acts, even among private individuals, must be done by deed or writing. Thus, the sale or transfer of a ship, or of any share therein, must be by writing (*i*). So, the sale or assignment of a copyright must be by writing (*k*). So, a lease of any tenements or hereditaments, for a term of more than three years, must be by deed (*l*). So, the promise of a debtor to pay a debt barred by the Statute of Limitations is void unless it be made in writing, and be signed by the party chargeable thereon (*m*). So, by the celebrated statute 29 Car. 2, c. 3, commonly called "The Statute of Frauds," any special promise by an executor or administrator to answer damages out of his own estate; or any special promise by one person to answer for the debt, default, or miscarriages of another; or any agreement made by any person upon consideration of marriage; or any contract or sale of lands, tenements, or hereditaments, or any interests in or concerning them; or any agreement that is not to be performed within the space of one year from the making thereof, — must be proved by some memorandum or note in writing, signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorised (*n*). And by the same statute, it is further enacted (*o*), that "no contract for the sale of any goods, wares, or merchandises, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised." In many cases also certain forms are superadded to writing. Thus, it is of the essence of a *deed* that it be

(*i*) 17 & 18 Vict. c. 104, s. 55.

(*k*) 5 & 6 Vict. c. 45; 3 & 4 Will. 4, c. 15.

(*l*) 8 & 9 Vict. c. 106, s. 3; 29 Car. 2, c. 3, ss. 1, 2.

(*m*) 9 Geo. 4, c. 14, s. 1.

(*n*) Sect. 4.

(*o*) Sect. 16 (marked 17 in the ordinary copies).

sealed and delivered (*p*); and by the 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), a will must be in writing, and executed by being signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature must be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time; and such witnesses must attest and subscribe the will in the presence of the testator. Nor are provisions such as these in any way peculiar to our law; for the Jews, the Romans, and the Anglo-Saxons had, and most modern nations have, their pre-appointed evidence, — requiring certain acts to be done by writing or in some particular way (*q*).

§ 61. As a general rule, when the law prescribes forms for pre-appointed evidence, the non-compliance with them is fatal to the transaction, and the whole becomes a nullity. "Non observatâ formâ infertur adnullatio actûs" (*r*). "Forma legalis, forma essentialis" (*s*). "Solemnitates legis sunt observandæ" (*t*). Bentham recommends that this should be reversed, and that pointed suspicion, not nullification, should be the result (*u*); but he admits that nullification is just in certain cases (*x*). It is impossible to deny that the principle under consideration may be, and often has been, extended beyond the limits alike of usefulness and propriety; and the truth and good sense of the entire matter seem contained in the following observations of Sir W. D. Evans (*y*): "The interest of society is greatly promoted, by establishing authentic criteria of judicial certainty, so far as this object can be effectuated without materially interfering with the claims of general convenience. Where the acts which may become the subject of examination will admit of deliberate preparation, and the purposes of them evince the propriety of a formal memorial of their occurrence, more especially when they are from their nature subject to error and misrepresentation, it is reasonable to expect that those who are interested in their preservation should provide for it in a manner previously regulated and established, or that, in case of neglect, their particular interest should be deemed subordinate to the great purposes of general certainty. But it is also certain that this system of precaution may be carried too far, by the exaction of for-

(*p*) 2 Blackst. Comm. 305, 306; Finch, Com. Laws, 24 a.

(*q*) See a variety of instances collected in Greenleaf's Law of Evidence, vol. 1, § 262, n. (1), 7th Ed. And for the French law, see Bonnier, Traité des Preuves, part. 2, liv. 2, 2nd Ed.

(*r*) 5 Co. iv. a; 12 Co. 7. The same holds in the French law. See Bonnier, Traité des Preuves, § 418, 2nd Ed.; Domat, part. 1, liv. 3, tit. 6, s. 2, § vi.

(*s*) 10 Co. 100 a.

(*t*) Jenk. Cent. 1, Cas. 22, and Cent. 3, Cas. 45.

(*u*) 2 Benth. Jud. Ev. 467, 487, 518.

(*x*) *Id.* 470.

(*y*) 2 Ev. Poth. 142.

malities, cumbersome and inconvenient to the general intercourse of civil transactions. The special application of these principles must be chiefly governed by municipal regulations; but, as a general observation, it is evident that the great excellence of any particular system must consist in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience as is consistent with general certainty and regularity. It may be added, that for these purposes every regulation should be attended with the most indisputable perspicuity; and that the established forms should be cautiously preserved from any intricacy or strictness that may tend to perplex and embarrass the subjects which they were designed to elucidate, and to endanger and destroy the substance which they were instituted to defend."

§ 62. Another plan, resorted to by the laws of most nations for guarding against misdecisions, consists in the repudiation as witnesses of persons whose testimony, either from personal interest in the matter in dispute, or other visible cause, seems likely to prove untrustworthy. This is the *recusatio testis* of the civilians, as distinguished from the *recusatio judicis*, or challenge of the judge, and in our law is called "The Incompetency of Witnesses." Its policy, however, has been seriously doubted, even fiercely attacked, in modern times; and much has been said and written on both sides of the question (*z*). Perhaps the true view of this matter is that the principle of repudiation should, at least in general, be confined to *pre-appointed* evidence. There is a great difference between the rejection of *evidence* and the rejection of *witnesses*. Evidence may fairly be rejected when it is so remote that, to allow tribunals to act on it, would invest them with dangerous or unconstitutional power; or when, being derivative instead of original, its very production carries the impress of a fraudulent suppression of better evidence; or when its disclosure would be against public policy. But the testimony of *casual* witnesses to a fact — *i. e.*, of persons who have incidentally witnessed it — comes under none of these heads. Such witnesses are the original depositories of the evidence; and in many cases the exclusion of their testimony would be to exclude all attainable evidence on the question in dispute, and to offer, by impunity, a premium to dishonesty, fraud, and crime. If it be said that, owing to personal interest in the matter in question, unsoundness of mind, deficiency of religion, antecedent misconduct, &c., their evidence is likely to prove unsafe, the answer is, that any line drawn on this

(*z*) See Benth. Jud. Ev. vol. i. pp. 3, 151, 152; vol. ii. pp. 541, 542, 543, and bk. 9, pt. 3; Tayl. Ev. §§ 1210 *et seq.*, 5th Ed.; Ph. & Am. Ev. 43–45; Bonnier, Traité des Preuves, §§ 225 *et seq.*, 275 *et seq.*, 2nd Ed.

subject must necessarily be in the highest degree arbitrary. It is impossible to enumerate, à priori, the causes which may distort or bias the minds of men, to mis-state or pervert the truth, or to estimate the weight of each of these causes in each individual case or with each particular person. But it is very different with *pre-appointed* evidence, where parties have the power to select their own witnesses. To such parties the law may fairly say, "You shall for this purpose select persons who, from their station, occupation, or habits, are likely to be of more than ordinary intelligence, knowledge, or trustworthiness; if you do not, you must take the consequences." All this seems a natural and just development of the great principle — in the English law a fundamental one — that requires the *best evidence* to be given, and is further recommended by being rarely productive of injury or inconvenience (*a*).

§ 63. But whatever the real value of this plan for securing the trustworthiness of evidence, its abuses have been enormous. In the civil and canon laws, the list of persons liable to be rejected as incompetent to bear testimony was so large that, if the rules of exclusion had not been qualified or evaded, it is difficult to see how, even with the interrogation of parties and the perilous aid of the decisory and suppletory oaths, justice could have been administered at all (*b*). And these very qualifications and evasions gave rise to a still greater evil, which shall be noticed presently (*c*). In some instances entire classes were rejected, not from any distrust of their veracity, but as a punishment for offences, or with the view of affixing a stigma on religious or political opinions. The strongest illustration of this is to be found in the celebrated constitution of the Greek emperor: by which Pagans, Manichæans, and members of some other sects were disqualified from giving evidence under any circumstances; while heretics and Jews were only allowed to do so in causes in which heretics or Jews were parties, and, except in some peculiar cases from necessity, could not bear testimony against orthodox Christians (*d*). Similar principles prevailed in the canon law (*e*), which also, as might have been expected, rejected the evidence of excommunicated persons, at least when tendered against such as were orthodox (*f*).

(*a*) See on this subject, bk. 1, pt. 1, and bk. 3, pt. 2.

(*b*) See Dig. lib. 22, tit. 5; Cod. lib. 4, tit. 20; Huberus, Præl. Jur. Civ. lib. 22, tit. 5; Heinec. ad Pand. pars 4, §§ 136–140; Devot. Inst. Canon. lib. 3, tit. 9, §§ 13 *et seq.*, 5th Ed.; Decret. Greg. IX. lib. 2, tit. 20. Bonnier, in his Traité des Preuves, §§ 225 *et seq.*, considers that the positive rejection of witnesses was rare in the ancient Roman law, and that the complicated system established in Europe was chiefly the work of the middle ages.

(*c*) See *infrà*, § 74.

(*d*) Cod. lib. 1, tit. 5, l. 21.

(*e*) Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 19; Ayl. Par. Jur. Can. Angl. 448; Devot. Inst. Canon. lib. 3, tit. 9, § 13.

(*f*) Lancel. *in loc. cit.*

Even whole races and nations have occasionally been brought within the pale of exclusion; as in some parts of the West Indies (*g*), and some of the United States of America (*h*), where the evidence of a negro slave was not receivable against a free person; and in India, where that of a Hindoo seems not to have been receivable against a Mohammedan (*i*). The following law of the State of Alabama, passed so late as 1852, carried the matter much farther: "Negroes, mulattoes, Indians, *and* all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white *person*, whether bond or free, cannot be a witness in any cause, civil or criminal, except for or against each other" (*k*). Although the English law never went so far in this respect as those of most other countries, yet even among us the number of grounds of incompetency to give evidence was formerly very considerable. They have been much reduced in modern times by the decisions of the judges and the interference of the legislature (*l*).

§ 64. One of the strangest and most absurd applications of this principle was the rejecting, or at least regarding with suspicion, the testimony of *women* as compared with that of *men*. The following law is attributed to Moses by Josephus: "Let the testimony of women not be received, on account of the levity and audacity of their sex" (*m*), — a law which looks apocryphal (*n*), but which even if genuine could not have been of universal application (*o*). The Hindoo code, it appears, rejected their evidence generally, if not absolutely (*p*); as likewise did the Mohammedan law, in charges of adultery, and in some other instances (*q*). Nor were these merely Asiatic views. The law of ancient Rome, while admitting their testimony in general, refused it in certain cases (*r*). The civil and canon laws of mediæval

(*g*) Browne's Civil Law, vol. i. p. 107, n. 2nd Ed.; Shephard's Colonial Practice of St. Vincent, 69, 70.

(*h*) Appleton on Evidence, App. 271, 275, 276, 277, 278.

(*i*) See Arbuthnot's Reports of the Foujdaree Udalut, p. 1, and Preface, p. xxiii; Goodeve, Evid. 113

(*k*) Appleton, Evid., App. 275, 276.

(*l*) On the subject of the incompetency of witnesses, see bk. 1, pt. 2, and bk. 2, pt. 1, ch. 2.

(*m*) Joseph. Antiq. Judaic. lib 4, c. 8, No. 15. Γυναικῶν δὲ μὴ ἔστω μαρτυρία, διὰ κουφότητα καὶ θράσος τοῦ γένους αὐτῶν.

(*n*) Independently of the inspiration of the Pentateuch, and its significant silence on the subject, the style of this law is widely different from that of Moses.

(*o*) See, *e. g.*, Deut. xxi. 18–21. Solomon, also, in his celebrated judgment, 1 Kings, iii. 16 *et seq.*, seems to have made no difficulty about receiving the statements of the two women.

(*p*) See Translation of Pootee, ch. 3, s. 8, in Halhed's Code of Gentoo Laws, and Goodeve, Evid. 87.

(*q*) See Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50; Hamilton's Translation of Hedàya, vol. i. p. 382; Macnaghten's Moohummedan Law, 77; and Arbuthnot's Reports of the Foujdaree Udalut, p. 3.

(*r*) Dig. lib. 22, tit. 5, l. 18.

Europe seem to have carried the exclusion much farther (*s*) Mascardus (*t*) says, "Feminis plerumque omninò non creditur, ob id duntaxat, quod sunt feminæ, quæ ut plurimum solent esse fraudulentæ, fallaces, et dolosæ;" and Lancelottus, in his Institutiones Juris Canonici (*u*), lays down in the most distinct terms that women cannot in general be witnesses, citing the language of Virgil, "Varium et mutabile semper femina" (*x*), — not the only instance in which poetry has been invoked to justify maxims and laws indefensible by reason. That these rules were plastic enough, like the other rules of those systems, so as to admit many exceptions, may easily be conceived (*y*); but the following extract from the work of an able French jurist of our time shows how long the principle held its ground on the continent (*z*). "After women had been admitted to bear testimony by an ordinance of Charles VI." (of France) "of the 15th Nov., 1394, it was long before their evidence was considered equivalent to that of a man. Bruneau, although a contemporary of Mde. de Sévigné, did not scruple to write, in 1686, that the deposition of three women was only equal to that of two men. At Berne, so late as 1821, in the Canton of Vaud, so late as 1824, the testimony of two women was required to counterbalance that of one man. We will say nothing of the minor distinctions with which the system was complicated, such, for instance, as the principle that a virgin was entitled to greater credit than a widow, — *magis creditur virgini quàm viduæ*." In the edition of the Institutiones Canonicæ of Devotus (*a*), published at Paris in 1852, it is distinctly stated that, except in a few peculiar instances, women are not competent witnesses in criminal cases. In Scotland also, until the beginning of the 18th century, sex was a cause of exclusion from the witness-box, in the great majority of instances (*b*). Even our old English lawyers occasionally rejected the evidence of women, on the ground that they are *frail* (*c*). Sir Edward Coke (*d*), in the reign of Charles I., without a single note of dissent or disapprobation, writes thus: "In some cases women are by law wholly excluded to bear testimony; as to prove a man to be a villein (*e*), — *mulieres ad probationem statûs hominis admitti non debent*." It seems also that in very early times,

(*s*) Mascardus de Prob. Concl. 763–765; Lancel. Inst. Jur. Can. lib. 3, tit. 14, §§ 14 and 15; Decret. Gratian. pars 2, causa 33, quæst. 5, c. 17. See also Heinec. ad Pand. pars 4, § 127 (2).

(*t*) Mascardus de Prob. Concl. 763, nn. 2, 3.

(*u*) Lib. 3, tit. 14, §§ 14 and 15.

(*x*) Æn. 4, 569, 570.

(*y*) See Mascard. *in loc. cit.*

(*z*) Bonnier, Traité des Preuves, § 243, 2nd Ed.

(*a*) Lib. 3, tit. 9, § 14.

(*b*) Hume, Crim. Law of Scotland, vol. 2, pp. 339, 340; Burnett, Crim. Law of Scotland, 388–390; 20 How. St. Tr. 44, n.

(*c*) Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30.

(*d*) Co. Litt. 6 b.

(*e*) Acc. Fitzh. Abr. Villenage, pl. 37; Bro. Abr. Testmoignes, pl. 30, who refers to a case in the 13 Edw. I.; Britton, c. 31. See, however, the case on the eyre of York, in the 13 Hen. III., cited by Fitzh. Villenage, pl. 43.

their testimony was insufficient to prove issue born alive, so as to entitle a man to be tenant by the curtesy (*f*); neither could they prove the summons of jurors in an assize (*g*).

§ 65. One of the most obvious modes of guarding against misdecision consists in the exacting a certain number of witnesses or other media of proof.[1] The advantage of a plurality of witnesses consists in this, that a false story runs great risk of being detected by discrepancies in their testimony, especially if they are questioned skilfully and out of the hearing of each other (*h*). But, however salutary such a rule may be in countries where mendacity and perjury are so common and notorious as scarcely to be looked upon as crimes (*i*), and everywhere in some cases of a serious and peculiar nature, it is certainly not based on any principle of general jurisprudence, and wherever so considered has brought immense evils in its train (*k*).

§ 66. The law of Moses in certain criminal cases, and the New Testament in certain ecclesiastical matters, require two witnesses; whence the civilians and canonists (the latter at least) inferred a divine command to exact that number in all cases, both civil and criminal (*l*). The text of the Imperial Code is positive: "Manifestè sancimus, ut unius omninò testis responsio non audiatur etiamsi præclaræ curiæ honore præfulgeat (*m*): Solâ testatione prolatam, nec aliis legitimis adminiculis causam approbatam, nullius esse momenti, certum est" (*n*). And that of the

(*f*) See Hargrave's Co. Litt. 29 b, n. 5.

(*g*) Co. Litt. 158 b.

(*h*) A celebrated application of this principle is to be found in the story of Susannah and the Elders, in the Apocrypha.

(*i*) See the picture drawn by Cicero, in his oration for Flaccus, of the profligacy of the Greeks in this respect. "In some countries," says Bentham, 3 Jud. Ev. 168–169, "there have been said to exist a sort of houses-of-call, or register offices, for a sort of witnesses of all work, as in London for domestic servants and workmen in different lines, and in some parts of Italy for assassins. Ireland, whether in jest or in earnest, was at one time noted for breeding a class of witnesses, known for trading ones by a symbol of their trade, straws sticking out of their shoes. Under the Turkish government, it seems generally understood that the trade of testimony exists upon a footing at least as flourishing as that of any other branch of trade." The morals of mediæval Europe are well known to have been very low on this subject; and all accounts agree in describing hardened perjury as still rife throughout the East. As to India, see Goodeve, Evid. 238.

(*k*) See *infrà*, §§ 69 *et seq.*

(*l*) See *infrà*, bk. 3, pt. 2, ch. 10.

(*m*) Cod. lib. 4, tit. 20, l. 9, § 1.

(*n*) Cod. lib. 4, tit. 20, l. 4. Bonnier, in his Traité des Preuves, § 241, 2nd Ed., has an able argument to show that this principle was not established in the Roman jurisprudence until the time of the Lower Empire, and had its origin in the constitution of the Emperor Constantine, Cod. lib. 4, tit. 20, l. 9, § 1, which (Bonnier thinks) converted into a rule of law what had previously been laid down as a matter of

[1] See § 596, n. 1, *infra*.

Decretals runs thus (*o*): "Licèt quædam sint causæ quæ plures quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur." Sometimes even this was insufficient. Five witnesses were required by the imperial law to prove certain payments (*p*); the canon law occasionally required five, seven, or more witnesses to make full proof (*q*), and the number made necessary on criminal charges, brought against persons in office in the church, is almost incredible (*r*). By the law of Mohammed, a woman could not be convicted of adultery unless on the testimony of *four male* witnesses (*s*), and his successor, the Caliph Omar, decided, with reference to this law, that all circumstantial evidence, however proximate and convincing, was of no avail, and that the four male witnesses must have witnessed the very act in the strictest sense of the word (*t*).

§ 67. But since evidence may be circumstantial as well as direct, the system would have been imperfect, had not the number of *circumstances* requisite for conviction been defined with the same logical precision. *Three* presumptions at least were therefore considered necessary by certain doctors of the civil law; unless they were extremely strong, in which case *two* might suffice (*u*); and the Austrian legislature, by a law passed so late as 1833, but now abolished, prohibited in general all condemnation from circumstances, unless there were at least three. The climax of absurdity, however, appears in the code which until recently existed in Bavaria. Having observed that inculpative circumstances are

advice and caution. See further on this subject, Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2, and *infrà*, bk 3, pt 2, ch. 10.

(*o*) Decretal. Greg. IX. lib. 2, tit. 20, c. 23.

(*p*) Cod. lib 4, tit 20, l. 18.

(*q*) Ayl. Par. Jur. Can. Angl. 444; 1 Greenl. Ev. § 260 a, notes, 7th Ed.; *Evans* v. *Evans*, 1 Roberts. Eccl. R. 171.

(*r*) Fortescue, in his Treatise de Laud. Leg. Angl. cap. 32 (written before the Reformation), tells us of a "lex Generalis Conciliì, quâ cavetur, ut non nisi *duodecim testium* depositione cardinales de criminibus convincantur." Waterhouse, in his Commentary on Fortescue, p. 405, says he is not aware what council is here alluded to, nor have we been able to find it; but he refers to the 2nd Council of Rome, under Sylvester, as given in the Concilia of Binius, vol. 1, pp. 315 and 318, the third chapter of which contains as follows: "Non damnabitur præsul, nisi in septuaginta duobus, neque præsul summus à quoquam judicabitur, quoniam his scriptum est: Non est discipulus super magistrum. Presbyter autem, nisi in quadraginta quatuor testimonia non damnabitur. Diaconus autem cardine constrictis urbis Romæ, nisi in triginta sex, non condemnabitur. Subdiaconus, acolythus, exorcista, lector, nisi (sicut scriptum est) in septem testimonia filios et uxorem habentes, omnino Christum prædicantes, sicut datur mystica veritas." In the laws of Hen. I. c. 5, also, there is this passage: "Non dampnetur presul nisi in lxxii. testibus; neque presul summus a quoquam judicetur. Presbiter cardinalis nisi in xliiii. testibus non dampnabitur; diaconus cardinalis nisi in xxvi.; subdiaconus et infra nisi in vii.; nec major in minorum impetitione dispereat."

(*s*) Gibbon's History of the Decline and Fall of the Roman Empire, ch. 50. See also Goodeve, Evid. 113.

(*t*) Gibbon, *in loc.*

(*u*) Bonnier, Traité des Preuves, § 723, 2nd Ed.

of three kinds, — viz., *antecedent* to the act, as preparations, threats, &c.; *concomitant*, as, in case of homicide, a weapon of the accused found near the dead body; and *subsequent*, as flight from justice, attempt to suborn witnesses, and the like, — the Bavarian legislature ordained that some circumstances belonging to each class must be proved (*x*).

§ 68 There is unquestionably no branch of jurisprudence whose principles have been so much abused and pushed beyond their legitimate limits as judicial proof, especially with regard to its *exclusionary* rules. This arises partly from its having been comparatively little understood in former times, — the substantive branches of law always coming to perfection before the adjective; and partly from artificial rules of evidence being found an excellent shield for acts which it is not desired to suppress, but which it would be unsafe or scandalous to legalise. In such cases the prohibiting the act, but requiring for the establishment of it evidence so peculiar, either in quantity or quality, as to render condemnation practically impossible, is the ready device of corrupt legislation.

Some abuses of judicial evidence have been alluded to in the course of this Introduction; and we purpose to conclude it by pointing attention to *two*, which, owing to their magnitude, their prevalence, and the danger under which all tribunals, especially such as are of a permanent nature, lie from them, deserve particular notice.

§ 69. The first of these has its origin in a natural tendency of the human mind to react, or turn round on itself, by assuming the convertibility of the end with the means used to attain it. As connected with the subject before us, this displays itself in the creation of a system of *technical*, and, as it were, *mechanical* belief, dependent on the presence of instruments of evidence in some given number; and which has with great truth and power been designated by Bonnier, in his Traité des Preuves (*y*), "système qui *tarifait* les témoignages, au lieu de les soumettre à la conscience du juge." It is strongly illustrated by the practice of the civil and canon laws on the continent of Europe, thus ably described by the eminent French lawyer just quoted (*z*): "The technical rules relative to testimonial proof which were devised, or at least developed, by the doctors of the middle ages, are of two

(*x*) It is right to mention that the statements here made relative to the laws of Austria and Bavaria are taken from Bonnier, Traité des Preuves, §§ 723 and 727, 2nd Ed.

(*y*) § 109, 2nd Ed.

(*z*) *Id.* § 239.

kinds. Some tend to exact absolutely certain conditions, in order that legal conviction may exist, while others, still more extravagant, tend to create in certain cases an *artificial legal conviction* even where real conviction may not exist." "If," he adds in another place (*a*), "the rule rejecting the testimony of a single witness was not perfectly reasonable, another principle, dangerous in a very different way, was that which, creating a legal conviction altogether artificial, established that the concurrent depositions of two unsuspected witnesses must necessarily induce condemnation. Here the application of the texts of the Corpus Juris was completely mistaken; for such a logical error was never professed at Rome, or even at Constantinople." But it was exactly suited to the scholastic and super-subtle spirit of more recent times. The texts of the code and of the decretal being peremptory, that the testimony of one witness could not be acted on under any circumstances (*b*), and that two were sufficient in all cases where no greater number was expressly required by law (*c*), the doctors of the civil and canon laws hastily (they perhaps thought logically) inferred, that the deposition of two witnesses who were omni exceptione majores amounted to *proof;* and bestowed on it the name of *full proof*, — "plena probatio" (*d*), — forgetting that proof means persuasion wrought in the mind, and consequently must depend, not on the number of instruments of evidence employed, but on their force, credibility, and concurrence. Nor was this all. If the testimony of two witnesses made full proof, that of one must be a *half proof*, which they called "semi-plena probatio" (*e*); and this arithmetical mode of estimating testimony being once established, it was extended by analogy to presumptive evidence, so that the subtilties of "proof" and "semi-proof" ran through the entire judicial system. Thus admissions extracted by torture (*f*), entries made by tradesmen in their books to the prejudice of other persons (*g*), an oath to the truth of his demand or defence, administered by the judge to the plaintiff or defendant (*h*), and occasionally even fame or rumour (*i*), were recognised as semi-

(*a*) Bonnier, Traité des Preuves, § 242, 2nd Ed. See also 5 Benth Jud. Ev. 470, 471.

(*b*) Cod. lib. 4, tit. 20, l. 9: "Unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat."

(*c*) Dig. lib. 22, tit. 5, l. 12: "Ubi numerus testium non adjicitur, etiam duo sufficiunt: pluralis enim elocutio duorum numero contenta est." See also Heinec. ad Pand. pars 4, § 143.

(*d*) Heinec. ad Pand. pars 4, §§ 118 and 143; Mascard. de Prob. Quæst. 11; Ayl. Par Jur Can. Angl. 448, 544.

(*e*) Mascard. *in loc. cit.;* Ayl. Par. Jur. Can. Angl. 444.

(*f*) Mascard. de Prob. Concl. 1392. See also Bonnier, Traité des Preuves, § 241, *vers. fin.*, 2nd Ed.

(*g*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. 719.

(*h*) 1 Ev. Poth. §§ 719, 829, 834; Heinec. ad Pand. pars 3, §§ 28, 29.

(*i*) Mascard. de Prob. Concl. 754, 755; Lancel. Inst. Jur. Can. lib. 3, tit 14, §§ 1 and 54; Ayl. Par. Jur. Can. Angl 444.

proofs, — two such usually constituting full proof. Some of the later civilians, feeling the absurdity of the position that the probative force of evidence is necessarily represented by unity, zero, or one half, introduced a sub-division of semi-proof into semi-plena major, semi-plena, and semi-plena minor (*k*); which, in all probability, only served to make matters worse, by rendering the system more technical. And a like rule was sometimes applied to the *credit* of witnesses. "The parliament of Toulouse," says Bonnier (*l*), quoting another French author, "has a peculiar mode of dealing with objections; it sometimes receives them according to their different quality, so that they do not destroy the deposition of the witness altogether, but leave it good for an eighth, a quarter, a half, or three quarters; and a deposition thus reduced in value requires the aid of another to become complete. For example, if on the depositions of four witnesses objected to, two are reduced to a half, that makes one witness; if the third deposition is reduced to a fourth, and the fourth to three quarters, that makes another witness, and consequently there is a sufficient proof by witnesses, although all have been objected to, and suffered in some degree from the objections taken."

§ 70 So firmly was this vicious principle worked into the law of France that in the great legal reform which took place in that country at the beginning of the present century, it was deemed advisable to take effective measures for its extirpation. With this view the Code Napoleon (*m*) ordained, that in criminal cases a sort of general instruction should be read to every jury by their foreman, before commencing their deliberations, and should also be affixed in large letters in the room whither they retire to deliberate, part of which is as follows: "La loi ne demande pas compte aux jurés des moyens par lesquels ils se sont convaincus; elle ne leur prescrit point de règles desquelles ils doivent faire particulièrement défendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes dans le silence et le recueillement, et de chercher, dans la sincérité de leur conscience, quelle impression ont faite sur leur raison les preuves rapportées contre l'accusé, et les moyens de sa défense. La loi ne leur dit point, '*Vous tiendrez pour*

(*k*) Heinec. ad Pand. pars 4, § 118; Kelemen, Institutiones Juris Hungarici Privati, lib. 3, §§ 98 and 100.

(*l*) Bonnier, Traité des Preuves, § 243, 2nd Ed. This practice of the parliament of Toulouse is likewise alluded to in Burnett's Crim. Law of Scotland, 528. It is worthy of remark that the same vicious principle was at one period creeping into the jurisprudence of the last-mentioned country, which borrowed so much from the civil law. See Hume's Crim. Law of Scotland, &c., vol. 2, ch. 10, pp. 293 *et seq.* and 19 How. St. Tr. 75 (n.).

(*m*) Code d'Instruction Criminelle, liv. 2, tit. 2, ch. 4, sect. 1, § 342.

vrai tout fait attesté par tel ou tel nombre de témoins ;' elle ne leur dit pas non plus, '*Vous ne regarderez pas comme suffisamment établie toute preuve qui ne sera pas formée de tel procès verbal, de telles pièces, de tant de témoins ou de tant d'indices :'* elle ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs, '*Avez-vous une intime conviction ?'*" This seems running into the other extreme, — for it implies, in language at least, that the jury are not confined to the legal evidence adduced, but are to form their judgment on whatever they know of themselves, or have heard elsewhere, or believe, respecting the matter before them. However this may be, the French civil code containing no analogous provision, Bonnier (in 1843 and 1852) thought it necessary to consider whether in civil cases the two witnesses are still required, or the "intime conviction" is dispensed with; both which points he resolves in the negative (*n*).

§§ 71, 72. The substitution of arithmetic for observation and reasoning, when estimating the value of evidence, is not confined to past ages. Bentham, in his work on Judicial Evidence, proposes a plan, or "thermometer of persuasion," quite as extraordinary as any devised by the civilians. Its fallacy has been ably exposed by M. Dumont, his French translator, and it is no longer necessary to do more than mention it (*o*).

§ 73. The mathematical calculus of probabilities, or "Doctrine of Chances," has, as is well known, been found of essential service in various political and social matters, apparently unconnected with the exact sciences. The modern system of life insurance, in particular, almost owes its existence to that branch of mathematics. Among other things, the notion presented itself of applying the calculus of probabilities to estimating the value of testimony given in courts of justice (*t*), — an object sought to be accomplished by adapting the established formulæ, which express the probability of the concurrence of independent events, to the probability of the evidence of concurring witnesses or independent facts. But no real analogy exists, in this respect, between judicial testimony and life insurance, or other matters of a similar nature. In the latter a series of facts

(*n*) Bonnier, Traité des Preuves, §§ 201; 202, and 2nd Ed. §§ 241, 242. It is but justice to many of the eminent civilians who in later times commented on the Roman law to state that they were perfectly alive to the absurdity of this theory of proof and semi-proof. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2; Heinec. ad Pand. pars 4, § 118.

(*o*) See the scale and the refutation in the prior editions of this work, ss. 71 and 72.

(*t*) Laplace, Essai Philosophique sur les Probabilités, 5th Ed.; Lacroix, Calcul des Probabilités, Paris, 1833; Poisson, Recherches sur la Probabilité des Jugemens en matière civile et en matière criminelle, &c. Paris, 1837; and the article "Probability" in the Encyclopædia Britannica.

and figures, collected by long and accurate observation, and carefully registered, supply data that bring the subject within the range of mathematical analysis, — a condition which wholly fails when we attempt to deal *practically* with the former (*u*).

§ 74. The remaining abuse, if less monstrous than the other (*x*), is to the full as formidable, and is sure to be found wherever the rules of evidence are too technical or artificial, and the decision of questions of fact is intrusted to a judge, instead of a jury or other casual tribunal. Although no tribunal could venture *systematically* to disregard a rule of evidence, however absurd or mischievous, — this would be setting aside the law, — tribunals may occasionally suspend the operation of such a rule without risk, and even with applause, when its enforcement would shock common sense; and the upright man who has the misfortune to be judge under such a system either relaxes the rule in those cases, or carries it out at all hazards under all circumstances. The unjust judge, on the contrary, converts this very strictness of the law into an engine of despotism, by which he is enabled to administer expletive or attributive justice at pleasure; while the world at large see nothing but the exoteric system, little suspecting that there is in the background an esoteric system with which only the initiated are acquainted. When a rule of this kind militates against an obnoxious party, the judge declares that he is bound to administer the law as he finds it, that it is not for him to overturn the decisions of his predecessors, or sit in judgment on the wisdom of the legislature; and to blame him for this is impossible. But when the party against whom the rule presses is a favoured one, the judge discovers that laws were made for the benefit of men, not their ruin, that technical objections argue an unworthy cause, and that the first duty of every tribunal is to administer substantial justice at any price.

§ 75. We have thus endeavoured to explain the principles on which judicial evidence is founded, to demonstrate its utility and necessity, and point out the chief abuses to which it is liable. The peculiar system existing in any particular place will of course depend much on the substantive municipal law with which it is connected, the customs and habits of society, and the standard of truth among the population. In this it only shares the fate of laws in general; of which it has been truly said, "Perpetua lex est,

(*u*) The fundamental principle on which the calculus of probabilities rests is, that *in order to determine the probability of an event, we must take the ratio of the favourable chances or cases to all the possible cases which in our judgment may occur.*

(*x*) *Vide supra*, § 69 *et seq.*

nullam legem humanam ac positivam perpetuam esse" (*y*). "Leges naturæ perfectissimæ sunt et immutabiles: Leges humanæ nascuntur, vivunt, et moriuntur" (*z*).

§ 76. Having now treated of evidence in general, and of judicial evidence as distinguished from it, we proceed to the more immediate object of the present work, — the system of judicial evidence established by the common law of England, for the use of its ordinary and regular tribunals, on the trial of facts in question before them, known in practice by the title of "The Law of Evidence." It is necessary to be thus precise, for several other kinds of evidence are observable in our jurisprudence. By sundry statutes, also, peculiar modes of proof are either prescribed or permitted in certain proceedings.

§ 77. "The Law of Evidence" will be best understood by treating of it under the four following heads; and the present work is divided into four Books accordingly, treating of, —

I. The English Law of Evidence in general.
II. Instruments of Evidence.
III. Rules regulating the Admissibility and Effect of Evidence.
IV. Forensic Practice and Examination of Witnesses.

(*y*) Bacon, Max. *sub reg.* 19. (*z*) *Calvin's case*, 7 Co. 25 a.

AMERICAN NOTES.

(§ 43) Conclusive Presumptions. — True presumptions (conf. § 296, n. 1, *infra*) are in their nature rebuttable; they are not proof. Conclusive presumptions, so called, are fictions of law in the nature of estoppels, and, as such, are usually founded upon public policy or convenience. Such presumptions are, as a rule, part of the substantive law; *e. g.*: —

(*a*) A lost grant, in certain instances, will, it is said, conclusively be presumed. 3 Greenl. Cruise on Real Prop. 423; 3 Kent, Comm. pp. 445, 446. (*b*) So the publication of a libel without reasonable and probable cause is conclusively presumed to be malicious. Bodwell *v.* Osgood, 3 Pick. 379; Wilson *v.* Noonan, 35 Wis. 321. (*c*) So conclusive presumption is, in certain cases, made in favor of the accuracy and legality of judicial records and proceedings. Ferris *v.* Ward, 4 Gilm. 499; Lang *v.* Phillips, 27 Ala. 311; Merritt *v.* Baldwin, 6 Wis. 439; Outlaw *v.* Davis, 27 Ill. 467; Hardiman *v.* Herbert, 11 Texas, 656; State *v.* Farish, 23 Miss. 483; Beale *v.* Commonwealth, 25 Pa. St. 11. Conf. §§ 226, n. 1, 588, n. 1, *infra*. Records may, however, be impeached by proof of fraud or coercion. 2 Whar. Ev. § 1234. Windsor *v.* McVeigh, 93 U. S. 274. (*d*) So one who fails to appear when duly summoned by legal process is conclusively presumed to confess the matter alleged. See The Mary, 9 Cranch, 126, 144; Bradstreet *v.* Nep. Ins. Co., 3 Sumn. 600, 607. (*e*) So ancient documents and transactions of long standing are conclusively presumed to have been, in all respects, rightly executed or legally done, and all witnesses thereto deceased. Freeman *v.* Thayer, 33 Me. 76; Cobleigh *v.* Young, 15 N. H. 493; Freeholders, &c. *v.* State, 4 Zabr. 718; Allegheny *v.* Nelson, 25 Pa. St. 332; Emmons *v.* Oldham, 12 Texas, 18; Austin *v.* Austin, 50 Me. 74. (*f*) As to how far

infancy is conclusively presumed to render certain crimes impossible, conf. 4 Blackst. Comm. 23; 1 Hale, P. C. 630; Russell on Crimes, pp. 108, 109; State *v.* Goin, 9 Humph. 175; Com. *v.* Mead, 10 All. 398; Peo. *v.* Randolph, 2 Parker, C. R. 213. State *v.* Sam, Winston (N. C.), 300. So a wife acting with her husband in the commission of certain felonies less than murder is conclusively presumed to have acted under his direction. 4 Blackst. Comm. 28, 29; 1 Whar. Am. Cr. Law, § 69 *et seq.;* Davis *v.* State, 15 Ohio, 72; Comp. Com. *v.* Neal, 10 Mass. 152; Com. *v.* Butler, 1 All. 4; State *v.* Parkerson, 1 Strobh. 169.

With regard to the absolutely conclusive effect of judgments, see § 588, n. 1, *infra*. For some consideration of the so-called conclusive presumption that every man knows the law, see § 296, n. 1, B. VII. (*b*), *infra*.

Estoppel.—For a consideration of the law of estoppel, see § 532, n. 1, *infra*.

BOOK I.

THE ENGLISH LAW OF EVIDENCE IN GENERAL.

Division of the Subject.

§ 78. THIS Book consists of two Parts. In the first it is proposed to take a general view of the English law of evidence; the second will be devoted to the history of its rise and progress, with some observations on its actual state and prospects.

PART I.

GENERAL VIEW OF THE ENGLISH LAW OF EVIDENCE.

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§ 79. THE necessity for judicial evidence, as distinguished from natural or moral evidence, has been shown in the Introduction to this work to arise out of the nature of municipal law and the func-

tions of judicial tribunals. The limitations which can properly be imposed by municipal law, on tribunals investigating facts, were there traced to the following principles: First, the maxim "Optima est lex, quæ minimum relinquit arbitrio judicis" (*a*), — the power of tribunals would be absolute, if bounds were not set to their discretion in declaring facts proved or disproved. Secondly, the necessity for speedy action in tribunals; which renders it part of the duty of the legislator to supply rules for the disposal of all matters which come before them, however difficult or even impossible it may be to get at the truth. Thirdly, the evils that would arise from considering only the direct, and disregarding the collateral, consequences of decisions. Lastly, the difference between the investigation of historical truth and of the facts which come in question in courts of justice, — the characteristic dangers to which the latter is exposed, requiring that characteristic securities should be framed to meet them. It was further shown that while these principles may be, and frequently have been, overstepped and pushed beyond their legitimate limits, the *chief* abuses to be guarded against by the legislator in dealing with judicial evidence are twofold. First, the creation of a technical and artificial system of belief, dependent on the presence of evidence in some particular quantity, without regard to its weight and credibility; and, secondly, the establishment of rules too stringent and technical to be always enforced, which a dishonest or prejudiced tribunal would consequently be enabled, without danger to itself, to insist on or relax, according to its interest, pleasure, or caprice.

§ 80. The characteristic features of the English common-law system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered, and may be stated as consisting of three great principles: 1. The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a *fixed*, matters of fact by a *casual*, tribunal; but this is a principle which found little favour with the Court of Chancery, and has gradually become a less integral part of the whole English system. 3. In determining the admissibility of evidence, the production of the *best evidence* should be exacted. We propose to consider these in their order, and will afterwards notice two other remarkable features of our system, less characteristic indeed, but exercising a most powerful influence in extracting truth and securing rectitude of decision; namely, the mode in which evidence is received by our tribunals, and the publicity of our judicial proceedings.

(*a*) Bac. de Augm. Scient. lib. 8, c. 3, tit. 1, Aphorism. 46.

§ 81. The first of the three may be despatched in a few words; as the least reflection will show how absurd it would be in any legislator to attempt to lay down rules for estimating the credit due to witnesses, or the probability of every fact which may present itself, in the innumerable combinations of nature and human action (*b*). The reliance to be placed on the statements of witnesses, and the inferences to be drawn from facts proved, must therefore be left for the most part to the sagacity of tribunals. But even here, for the reasons already given, some limits must be imposed; and the same causes which render artificial rules of evidence essential to the administration of justice show that those rules ought as far as possible to partake of the nature of other rules of municipal law (*c*). And however constituted the tribunal, but especially when it is of the mixed form that will be described presently, the true line seems to be, that the rules of law on this subject ought in general to be confined to the *admissibility* of proof, leaving its *weight* to the appreciation of the tribunal.

§ 82. Secondly, the Court of Chancery, following the practice of the civil law, always decided questions of fact without the assistance of a jury, except where a legal right came into question, when it "directed an issue" to a court of common law. Justices of the peace, too, have been empowered since the time of Edward the Third to convict persons summarily for trivial offences. But the ordinary common-law tribunal for deciding issues of fact consists of a court composed of one or more judges, learned in the law and armed with its authority; assisted by a jury of twelve men, unlearned in the law, taken indiscriminately from among the people of the county where the venue is laid, and possessing property to a defined amount. In some few instances the trial was, at common law, by the court without a jury; *i. e.*, trial by the record, inspection, certificate, and witnesses (*d*). And modern legislation has to a very considerable extent

(*b*) The following passage from the Digest is commonly cited in proof and illustration of this: "D. Hadrianus Vivio Varo Legato provinciæ Ciliciæ rescripsit, eum, qui judicat, magis posse scire, quanta fides habenda sit testibus. Verba epistolæ hæc sunt: 'Tu magis scire potes, quanta fides habenda sit testibus: qui, et cujus dignitatis, et cujus æstimationis sint: et qui simpliciter visi sint dicere, utrum unum eundemque meditatum sermonem attulerint; an ad ea, quæ interrogaveras, extempore verisimilia responderint.' Ejusdem quoque Principis extat rescriptum ad Valerium Verum de excutienda fide testium, in hæc verba: 'Quæ argumenta ad quem modum probandæ cuique rei sufficiant, nullo certo modo satis definiri potest: sicut non semper, ita sæpe sine publicis monumentis cujusque rei veritas deprehenditur: alias numerus testium, alias dignitas et auctoritas: alias veluti consentiens fama confirmat rei, de qua quæritur, fidem. Hoc ergo solum tibi rescribere possum summatim, non utique ad unam probationis speciem cognitionem statim alligari debere: sed ex sententia animi tui te æstimare oportere, quid aut credas, aut parum probatum tibi opinaris.' Idem Divus Hadrianus Junio Rufino Proconsuli Macedoniæ rescripsit, 'testibus se, non testimoniis crediturum.'" Dig. lib. 22, tit. 5, l. 3, §§ 1, 2, 3.

(*c*) Introd. pt. 2.

(*d*) 3 Blackst. Comm. 330.

allowed the parties to dispense with a jury. Thus the County Court Act (9 & 10 Vict. c. 95), s. 69, empowers judges of county courts to try questions of fact without a jury, provided neither party to the action requires a jury to be summoned; the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 1, as amended by 21 & 22 Vict. c. 74, s. 5), enabled the court or a judge to try causes without a jury, if the parties by consent in writing empowered them to do so; and the Rules of the Supreme Court (Order XXXVI., Rule 2) prescribe that (subject to certain rights of the parties to demand a jury) actions may be tried and heard, either before a judge or judges; or before a judge sitting with assessors; or before a judge and jury; or before an official or special referee, with or without assessors. In addition to this, the jurisdiction of justices of the peace has been widely extended by a series of statutes dealing with particular matters, and the Summary Jurisdiction Act, 1879, further increases a power previously given to convict summarily for indictable offences.

Where the trial is by jury, jurors may be challenged by the litigant parties for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision; in addition to which, persons accused of treason or felony are allowed to challenge peremptorily without cause, the former as many as thirty-five, the latter twenty, of the panel. The court is charged with the general conduct of the proceedings: it decides all questions of law and practice, including the admission and rejection of evidence, and when the case is ripe for adjudication, sums it up to the jury, — explaining the questions in dispute, with the law as bearing on them; pointing out on whom the burden of proof lies; and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, — as the decisions of tribunals on questions of fact ought to be based on reasonable evidence, and when the facts are undisputed, the decision as to what is reasonable is matter of law, and consequently within the province of the court (*e*), — it follows that it is the duty of the court to determine whether, assuming all the facts proved by the party on whom the burden of proof lies to be true, there is any evidence on which the jury could properly — *i. e.*, without acting unreasonably in the eye of the law — decide in his favour.[1] And if there be not, then the judge ought to withdraw the question from the jury, and direct a non-suit, if the onus is on the plaintiff; or direct a verdict for the plaintiff, if the onus is on the defendant (*f*). "Whether there be *any* evidence, is a question for

(*e*) *Michell* v. *Williams*, 11 M. & W. 205, 216, per Alderson, B.

(*f*) Per Willes, J., delivering the judgment of the court in *Ryder* v. *Wombwell*

[1] For American decisions see Heath *v.* Jaquith, 68 Me. 433; Dame *v.* Dame, 20 N. H. 28; Denny *v.* Williams, 5 All. 1; Commissioners *v.* Clark, 94 U. S. 278, acc.

the judge. Whether *sufficient* evidence, is for the jury" (*g*). On the other hand, the decision of the facts in issue is the exclusive province of the jury, who are therefore to hear the evidence and the comments made on it, to determine the credit due to the testimony of the witnesses, and to draw all requisite inferences of fact from the evidence. This division of the functions of the judge and jury is expressed by the maxim, "Ad quæstionem facti non respondent judices; ad quæstionem juris non respondent juratores"[1] (*h*). Thus, where the defendant, in an action for malicious prosecution, gives evidence to prove reasonable and probable cause, it is for the jury to find the facts; and it is for the judge to decide, as matter of law, whether the facts proved amount to reasonable and probable cause (*i*). But the above maxim must be taken with these limitations, — 1st. Facts on which the *admissibility* of evidence depends, are determined by the court, not by the jury (*k*). Thus, whether a sufficient foundation is laid for the reception of secondary evidence, is for the judge (*l*); and if the competency of a witness turns on any disputed fact, he must decide it (*m*). So, whether a confession in a criminal case is receivable (*n*); and whether, on a charge of homicide, a dying declaration was made by the deceased, at a time when he was under the conviction of his impending death, in which case alone it is admissible (*o*). And it seems the better opinion that, for the purpose of determining such collateral questions, the judge is not restricted to *legal* evidence (*p*). 2ndly. The jury thus far *incidentally* determine the law, that their verdict is usually general, — *i. e.*, guilty, or not guilty, for the plaintiff, or for the defendant, — such a verdict being manifestly compounded of the facts, and the

(in Cam. Scac.), L. R., 4 Ex. 32, 38; and see *Toomey* v. *The Brighton Railway Company*, 3 C. B., N. S. 146; *Dublin, &c. Railway Company* v. *Slattery*, L. R., 3 App. Cas. 1155; *Hodges* v. *Ancrum*, 11 Exch. 214; *Avery* v. *Bowden*, 6 E. & B. 962, 973–974.

(*g*) *Carpenters' Company* v. *Hayward*, 1 Dougl. 374, 375, per Buller, J. See also 1 Phil. Ev. 4, 10th ed.; *R.* v. *Smith*, Leigh & Cave, C. C. 607.

(*h*) This maxim is frequent in our old books; Co. Litt. 155 b, 226 a, 295 b; 8 Co. 155 a; 9 *Id.* 13 a, 25 a; 11 *Id.* 10 b, Vaugh. 149, &c. &c.; but many of our readers will probably be surprised to find that it has also been long known on the continent. See Bonnier, Traité des Preuves, § 74.

(*i*) *Panton* v. *Williams* (in Cam. Scac.), 2 Q. B. 169.

(*k*) *Bartlett* v. *Smith*, 11 M. & W. 483, 485–486, per Parke, B.; *Cleave* v. *Jones*, 7 Exch. 421; *Bennison* v. *Jewison*, 12 Jur. 485; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314; *Boyle* v. *Wiseman*, 11 Exch. 360.

(*l*) *Bennison* v. *Jewison*, 12 Jur. 485, per Alderson, B.

(*m*) *Bartlett* v. *Smith*, 11 M. & W. 483, 486, per Parke, B.; *R.* v. *Hill*, 2 Den. C. C. 254.

(*n*) *R.* v. *Warringham*, 2 Den. C. C. 447, n.; 15 Jur. 318.

(*o*) *Reg.* v. *Jenkins*, L. Rep., 1 C. C. 187; *Bartlett* v. *Smith*, 11 M. & W. 483, 486, per Parke, B.; *Bennison* v. *Jewison*, 12 Jur. 485, per Alderson, B. The law seems to be the same in the United States; see the numerous cases cited in note to § 505, *infra*.

(*p*) *Duke of Beaufort* v. *Crawshay*, H. & R. 638, and the authorities there referred to.

[1] For statement of effect of American decisions, see p. 86, *infra*.

law as applicable to them. But although the jury have always a right to find a verdict in this form, yet if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter (*q*).

Errors committed by the court, either in matters of law or in admitting or rejecting evidence, and occasionally in matters of practice, are corrected by application to a superior tribunal. Formerly, where evidence had been improperly admitted or rejected, a new trial was granted, unless it was clear that the result would not have been affected; but this rule is reversed by the present Rules of the Supreme Court, which prescribe that "a new trial shall not be granted, on the ground of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action." And if a jury misconduct themselves so as to defeat justice, — as, for instance, if they determine by lot what verdict to give, or, before giving it, hear other evidence besides that which was adduced in open court, — their verdict will be avoided. In civil cases, moreover, the court will grant a new trial, wherever they are satisfied that the verdict of the jury is in contravention of the law, whether the error has arisen from a mere misapprehension of the law by the jury (*r*), or their verdict is "perverse;" *i. e.*, where there is no dispute as to the facts, and the jury, disregarding the direction of the judge, have taken the exposition of the law into their own hands (*s*). So if they find a verdict against the evidence; *i. e.*, a verdict not merely erroneous in the judgment of the court above, but so unequivocally against the weight of evidence that it ought not to be allowed to stand (*t*). New trials are also sometimes granted, when a party has been taken by surprise at the trial, or has discovered important evidence unknown to him at the time it took place (*u*); and on some other grounds to which it is unnecessary to refer. In criminal cases, generally speaking, points of law must be reserved by the judge, and new trials are not grantable.

(*q*) See on this subject, Litt. sects. 366, 367, 368; Co. Litt. 226 b and 228 a; Hargrave's note (5) to Co. Litt. 155 b; Finch, Law, 399; 3 Blackst. Comm. 377, 378; 4 *Id.* 361; and 32 Geo. 3, c. 60.

(*r*) Per Lord Abinger, C. B., *The Att.-Gen.* v. *Rogers*, 11 M. & W. 670, 673.

(*s*) *Id.*; and see *Mould* v. *Griffiths*, 8 Jur. 1010, per Parke, B.; *Saunders* v. *Davies*, 16 Jur. 481, per Pollock, C. B.; *Hawkins* v. *Alder*, 18 C. B. 640, per Jervis, C. J.

(*t*) "The discretion of the court to grant a new trial must be a *judicial*, and not an *arbitrary* discretion;" per Glyn, C. J., in *Wood* v. *Gunston*, Sty. 466. See also *Creed* v. *Fisher*, 9 Exch. 472.

(*u*) See 2 Chit. Archb., 13th Ed., ch. xcviii., p. 1210.

§ 83 (*v*). Having given this sketch of the course of "trial by judge and jury," we should here dismiss the subject, were not a clear perception of the principle on which it is founded indispensable to a right understanding of our rules of judicial evidence. Looking at the different sorts of tribunals which have existed in different ages and countries, we shall find this distinction running through them, viz., that some are *fixed* and some *casual* (*x*). By "fixed" tribunals are meant those composed of persons appointed, either permanently or for a definite time, to take cognisance of causes of a specified kind; and they most usually consist of men who have made legal matters the subject either of their study or practice: "casual" tribunals are called together for the occasion, and dismissed when the cause is decided, and properly should consist of private individuals, possessed of no peculiar legal knowledge. Now each of these has its advantages and disadvantages. For the decision of questions of *abstract law*, the superiority of a fixed tribunal is too obvious to need remark; and even for questions of *fact*, a superior education, and most probably a higher order of intellect, and a practical acquaintance, from the experience of years, with men in general, with the tricks of witnesses, and the sophistries of advocates, might seem at first sight almost equally decisive in its favour. Even as regards accuracy of decision, however, the advantage in deciding facts is on the side of the casual tribunal. From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding, adjudicating, and punishing dims and blunts more or less in the mind of every judge. But the great danger of a fixed tribunal is methodical or artificial decision, — a sort of decision by routine, arising out of the faculty of generalising, classifying, and distinguishing, which is so valuable in the investigation of questions of mere law. This is clearly stated by the Marquis Beccaria, whose testimony is the more valuable from being that of a foreigner (*b*). "I deem that the best judicial system which

(*v*) As to sections 83–85, see note (*i*) at p. 79, post.

(*x*) Paley's Moral and Political Philosophy, bk. 6, ch. 8.

(*b*) "Io credo ottima legge quella, che stabilisce assessori al giudice principale, presi dalla sorte, e non dalla scelta; perchè in questo caso è più sicura l' ignoranza che giudica per sentimento, che la scienza che giudica per opinione. Dove le leggi sono chiare e precise, l' officio di un giudice non consiste in altro che di accertare un fatto. Se nel cercare le prove di un delitto richiedesi abilità e destrezza, se nel presentarne il risultato è necessario chiarezza e precisione; per giudicarne dal risultato medesimo, non vi si richiede che un semplice ed ordinario buon senso, meno fallace che il sapere di un giudice assuefatto a voler trovar rei, e che tutto riduce ad un sistema fattizio adottato da' suoi studj." Beccaria, Dei Delitti e delle Pene, § 7. See also the observa-

associates with the principal judge assessors, not selected, but chosen by lot; for, in such matters, ignorance which judges by sense is safer than science which judges by opinion. Where the law is clear and precise, the duty of the tribunal is limited to ascertaining the existence of facts. And although, in seeking the proofs of crime, ability and dexterity are required; although, in summing up the result of those proofs perspicuity and precision are indispensable, — still, in order to draw a conclusion from them, nothing more is required than plain ordinary good sense, less fallacious than the learning of a judge accustomed to seek the proofs of guilt, and who reduces everything to an artificial system formed by study." And here it is essential to remember that the consequences of the errors of the casual tribunal are immensely less. Theirs are mostly errors of *impulse*, and their consequences are almost entirely confined to the actual case in which they are committed. The errors of a fixed tribunal, on the contrary, are the errors of *system*, and their effects are lasting and general. Their decisions, proceeding, as they do, from persons in authority, will, especially if ever so slightly involving a point of law, be reported, or what is even more objectionable, remembered without being reported, and form precedents by which future tribunals will be swayed. Nor is even this the worst, — the judge to whom the precedent made by his predecessor is cited is safe from censure if he follows it; while on the other hand, being erroneous in itself, he may without danger disregard it: so that, if corrupt or prejudiced, he may take as his guide either the true principles of proof or the previous wrong decision, and thus give judgment for the plaintiff or for the defendant at pleasure (*c*).

§ 84. But the invincible objection to fixed tribunals — *i. e.*, fixed tribunals intrusted to decide both law and facts — exists in the difficulty, not to say impossibility, of keeping them pure, when the questions at issue are of great weight and importance. The judge's name, being known to the world, indicates to the evil-disposed litigant the person to whom his bribe can be offered, or on whose mind influence may be brought to bear; and a frightful temptation is held out to the executive, to secure the condemnation of political enemies by placing on the seat of justice persons of complying morals or timorous dispositions. We commonly hear the purity of the British bench ascribed exclusively, or nearly so, to the statutes 12 & 13 Will. 3, c. 2, s. 3, and 1 Geo. 3, c. 23, which rendered judges

tions of Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 162, and Paley's Moral and Political Philosophy, bk. 6, ch. 8.

(*c*) Introd. § 74.

irremovable at the pleasure of the crown; not remembering that, however valuable those enactments are on many grounds, *appointment* to the bench is as much in the hands of the crown as ever it was; and that even under the old system men were found, like Gascoigne, Hale, and others, who defied the crown when in discharge of their duty. But where the ultimate fate of every case is pronounced by a body, the individual members of which are unknown until the moment of trial, all this is removed; and in modern times it is the packed jury, not the corrupt judge, which upright citizens have to dread.

§ 85. The description already given of our common-law tribunal shows it to be one of a compound nature, — partly fixed and partly casual, — and which will be found so constructed as to secure very nearly all the advantages of each of the opposing systems, while it avoids their characteristic dangers (*d*). The system of confiding to the judge the decision of all questions of law and practice secures the law and the practice from being altered by any mistake, or even misconduct, of the jury; by treating as matter of law, and consequently within the province of the judge, the admissibility of evidence, and the sufficiency, as a legal basis of adjudication, of any evidence that may be received, it prevents the jury from acting without evidence, or on illegal evidence; and by intrusting the judge with the general oversight of the proceedings and the duty of commenting upon the evidence, it renders available his knowledge and experience. But, by taking out of the hands of the judge the actual decision on the facts and the application of the law to them, it cuts up mechanical decision by the roots, prevents artificial systems of proof from being formed, and secures the other advantages of a casual tribunal. Besides, the difference that exists between the judge and jury, in station, acquirements, habits, and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action. When, for instance, the condemnation of a criminal is pronounced, both by the representative of the law, and by a number of persons chosen indifferently from the body of the community, the blow descends on him and the other evil-disposed members of it with a force which it never could have, if based solely on the reasoning of the one, or the consultation of the other. To these considerations must be added the constitutional protection which the presence of a jury affords to the free citizen, — a matter too well known to need much explanation. On the other hand, there are no doubt many cases in which the want of a trained mind to consider and decide them is the main one; and

(*d*) Paley's Moral and Political Philosophy, bk. 6, ch. 8.

many others in which the selection of the tribunal to decide them may fairly be left to the parties themselves. Many criminal cases, again, are of so simple a character that the summary decision of them by a fixed tribunal easily accessible is preferable to the rather tedious procedure of indictment before a jury. Modern legislation has taken from a jury the power to decide questions of account (*e*), and has intrusted the judges with the power of framing rules of court upon the subject. The present rules (*f*) leave the mode of trial much to the discretion of the judge, and much to the selection of the parties, but while they appoint trial by a judge without a jury as the mode of trial if neither party requires otherwise, give a right to trial by jury on the application of either party in all cases except those involving matters of account, or arising out of the execution of trusts, the administration of the estates of deceased persons, and other matters of an administrative character (*ff*). In county courts, however, either party has a right to the trial by jury of any question of fact.

In criminal matters all graver offences are tried by indictment before a judge and jury; but the lesser offences have since the time of Edward the Third been tried by a court of summary jurisdiction, consisting of two or more justices of the peace, and in some cases even one single justice of the peace, the jurisdiction of which court has been much enlarged in recent times, not only by special statutes in relation to particular offences, but by general statutes in relation to juvenile offenders, and adults pleading guilty (*g*).

§ 86. We come to the third great feature of the common-law mode of proof, — the general principles by which the admissibility of evidence is governed. And here it is to be observed that the rules of evidence are of three kinds: 1st. Those which relate to evidence *in causâ; i. e.*, evidence adduced to prove the questions in dispute. 2nd. Those affecting evidence *extrà causam*, or that which is used only to test the accuracy of media of proof. 3rd. Rules of forensic practice respecting evidence. Now it is to the first of these that the term "rules of evidence" most properly applies, — much evidence which would be rejected if tendered in causâ being perfectly receivable as evidence extrà causam; and there are few trials in which this sort of evidence does not play an important part. Again, the judge has a certain latitude allowed him with respect to the rules of forensic proof. He may ask any questions in any form,

(*e*) See Judicature Act, 1873, ss. 56 and 57.

(*f*) Order XXXVI. Rules 2–7.

(*ff*) Being the matters assigned to the Chancery Division of the High Court. See Judicature Act, 1873, s. 34.

(*g*) See Summary Jurisdiction Act, 1879.

and at any stage of the cause, and to a certain extent even allow parties or their advocates to do so. This, however, does not mean that he can receive illegal evidence at pleasure; for if such be left to the jury, a new trial may be granted, even though the evidence were extracted by questions put from the bench, but it is a power necessary to prevent justice being defeated by technicality, to secure indicative evidence (*k*), and in criminal cases to assist in fixing the amount of punishment. And it should be exercised with due discretion. "Discretio est discernere *per legem*, quid sit justum" (*l*); "In maximâ potentiâ minima licentia" (*m*): "Discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections" (*n*).

§ 87. With regard to evidence in causâ — to which we are now confining our attention — it was said by a most eminent judge in a most important case, that "The judges and sages of the law have laid it down that there is but ONE GENERAL RULE OF EVIDENCE, *the best that the nature of the case will admit*" (*o*).[1] And Lord Chief Baron Gilbert, to whom principally we are indebted for reducing our law of evidence into a system, says: "The first and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of" (*p*): "the true meaning of the rule of law, that requires the greatest evidence that the nature of the thing is capable of, is this: That no such evidence shall be brought, which ex naturâ rei supposes still a greater evidence behind, in the party's own possession and power" (*q*). And in another old work of authority (*r*): "It seems in regard to evidence to be an uncontestable rule that the party who is to prove any fact must do it by the *highest* evidence of which the nature of the thing is capable." Similar language is to be found in most of our modern books (*s*).

The important rule in question has, however, been very often misunderstood, — partly from the ambiguous nature of the language in which it is enunciated, and partly from its being commonly accompanied by an illustration which has been confounded with the

(*k*) For "indicative" evidence, see *infrà*.

(*l*) Co. Litt. 227 b; 2 Inst. 56; 4 Inst. 41; 6 Q. B. 700.

(*m*) Hob. 159.

(*n*) 5 Co. 100 a. See also 7 Co. *Calvin's case*, 27 a, and 10 Co. 140 a; 19 How. St. Tr. 1089; 4 Burr. 2539.

(*o*) Lord Hardwicke, Ch., in *Omychund* v. *Barker*, 1 Atk. 21, 49.

(*p*) Gilb. Ev. 4, 4th Ed.

(*q*) *Id.* 16, 4th Ed.

(*r*) Bac. Abr. Evid. 1st Ed. 1736.

(*s*) 3 Steph. Comm. 541; Peake's Ev. 8; 2 Ev. Poth. 147–148; 1 Greenl. Ev. § 82, 7th Ed.; 1 Taylor's Ev. ch. iv. § 363 *et seq.*; Powell's Ev. 4th Ed. 60, &c.

[1] For the American law on this subject, see p. 87, *infra*.

rule itself. "If," says Lord Chief Baron Gilbert (*t*), "a man offers a copy of a deed or will, where he ought to produce the original, this carries a presumption with it that there is something more in the deed or will that makes against the party, or else he would have produced it; and therefore the proof of a copy in this case is not evidence." This is undoubtedly true, but it is a great mistake to suppose it to be the full extent of the rule, — "Exempla illustrant, non restringunt legem" (*u*). Sometimes, again, it has been misunderstood as implying that the law requires in every case the most convincing or credible evidence which could be produced under the circumstances. But all the authorities agree that this is not its meaning (*x*); as further appears from the maxims, that "there are no degrees of parol evidence" and "no degrees of secondary evidence." Suppose an indictment for an assault, or, to make the case stronger, for wounding with intent to murder (an offence capital until the 24 & 25 Vict. c. 100, and still punishable with penal servitude for life): the injured party, though present in court, is not called as a witness, and it is proposed to prove the charge by the evidence of a person who witnessed the transaction at the distance of a mile, or even through a telescope; this evidence would be *admissible*, because it is connected with the act, — the senses of the witness having been brought to bear upon it; and the not producing, what would probably be more satisfactory, the evidence of the party injured, is mere matter of observation, to be addressed to the jury. Again, by "secondary evidence" is meant derivative evidence of the contents of a written document; and it is a principle that such is not receivable unless the absence of the "primary evidence," the document itself, is satisfactorily accounted for (*y*). But when this has been done, any form of secondary evidence is receivable (*z*). Thus, the parol evidence of a witness is admissible though there is a copy of the document, and the probability that it would be more trustworthy than his memory is only a matter of observation (*a*).

§ 88. The true meaning of this fundamental principle will be best understood by considering the *three* chief applications of it. Evidence, in order to be receivable, should come through proper instruments, and be in general original and proximate. With respect to the first of these: with the exception of a few matters which either the law notices judicially, or which are deemed too notorious to require proof, the judge and jury must not decide facts on their

(*t*) Gilb. Ev. 16, 4th Ed.
(*u*) Co. Litt. 24 a.
(*x*) See the authorities in note (*s*).
(*y*) *Infrà*, bk. 3, pt. 2, ch. 3.
(*z*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102.
(*a*) *Id.* 106, 107.

personal knowledge;[1] and they should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it (*b*). "Non refert quid notum sit judici, si notum non sit in formâ judicii" (*c*). It is obvious that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public, to know on what grounds the decision proceeded, but it might be founded on common rumour, or other forms of evidence, the very worst instead of the best.

§ 89. The next branch of this rule is that which exacts original and rejects derivative evidence, and prescribes that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld (*d*). "Meliùs (or 'satiùs') est petere fontes quàm sectari rivulos" (*e*). The terms "primary" and "secondary" evidence are used by our law in the limited sense of the original and derivative evidence of written documents; the latter of which is receivable when, by credible testimony, the existence of the primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral and the various other sorts of evidence comprised in practice under the very inadequate phrase "hearsay evidence" (*f*).[2]

§ 90. The remaining application of this great principle which we propose to notice at present seems based on the maxim, "In jure non remota causa, sed proxima spectatur" (*g*). It may be stated thus, that, as a condition precedent to the *admissibility* of evidence,

(*b*) *Infrà*, bk. 3, pt. 1, ch. 1; Introd. § 38.

(*c*) 3 Bulst. 115.

(*d*) Per Parke, B., in delivering the judgment of the Court of Exchequer in *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497; *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102, 106, per Parke, B.; *Macdonnell* v. *Evans*, 11 C. B. 930, 942, per Maule, J.

(*e*) Co. Litt. 305 b; 8 Co. 116 b; 10 Co. 41 a.

(*f*) *Infrà*, bk. 3, pt. 2, ch. 4.

(*g*) Bac. Max. of the Law, Reg. 1; 12 East, 652; 14 M. & W. 483; 6 B. & S. 881; H. & R. 61; 18 C. B. 379; 18 Jur. 962.

[1] That a jury in the United States cannot find facts of their own knowledge, see Kent *v.* State, 42 Oh. St. 26.

[2] The phrase "hearsay evidence" is certainly open to grave objection. (Steph. Dig. Law Ev. (May's Amer. Ed.), Preface, p. 22; § 492, n. 1, *infra*.) But it may be doubted whether the phrase "derivative evidence" is a felicitous one, especially as applied to the subject-matter of the "hearsay rule." The original source of hearsay evidence may not be withheld; the desirable witness may be dead, or it may be practically impossible to secure attendance. See also § 87, n. 1, *supra*.

either direct or circumstantial, the law requires *an open and visible connection* between the principal and evidentiary facts, whether they be ultimate or subalternate.[1] This does not mean a *necessary* connection, — that would exclude all *presumptive* evidence, — but such as is reasonable, and not latent or conjectural. In this our judicial evidence partakes of the very essence of all sound municipal law, and preserves the lives, liberties, and properties of men, by placing an effectual rein on the imagination of those intrusted with the administration of justice, and preventing decision on remote inferences and fancied analogies (*h*).

§ 91. The true character and value of the important principle now under consideration is, however, more easily conceived than described. In dealing with natural evidence, the connection between the principal and evidentiary facts must be left to instinct (*i*); in legal evidence this is replaced by a sort of legal instinct, or legal sense, acquired by practice; and the old observation, "Multa multò exercitamentis facilius quàm regulis percipies" (*k*), becomes perfectly applicable. A few instances, however, may serve for illustration. On a criminal trial, the confession of a third party, not produced as a witness, that he was the real criminal, and that the accused is innocent, although certainly not destitute of natural weight, would be rejected, from its remoteness and want of connection with the accused, and the manifest danger of collusion and fabrication. So if a man writes in his pocket-book that he owes me 5*l.*, it is reasonable evidence against him that he owes me that sum, although it is quite possible he may be mistaken. But suppose he were to write in it that I owe him 5*l.*, that statement, though possibly quite true, is no evidence against me; for the want of connection is obvious. Again, the bad character or reputation of an accused person, although strong moral, is not legal evidence against him, unless he sets up his character as a defence to the charge (*l*). The sound policy, which requires that even the worst criminals shall receive a fair and unprejudiced trial, renders this rule indispensable. So a man's appearance and physiognomy are not unfrequently excellent guides to his character and disposition, but they ought not to be, and they are not receivable as legal evidence against him (*m*).

(*h*) Introd. § 38.

(*i*) 1 Benth. Jud. Ev. 44.

(*k*) 4 Inst. 50.

(*l*) See this subject very fully considered in *Reg.* v. *Rowton*, 34 L. J., M. C. 57.

(*m*) Some of the French lawyers thought they ought. "On allait jusqu'à mettre au nombre de ces indices" (*i. e.*, indices éloignés) "*la mauvaise physiognomie de l'accusé, ou le vilain nom qu'il portait.* Mais c'étaient là, il faut en convenir, des indices très-éloignés." Bonnier, Traité des Preuves, § 652.

[1] See § 251, n. 1, *infra*.

§ 92. But whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence, such as that tendered, could be made the ground of decision; for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind. Suppose, in a case of murder by a cutting instrument, no eye-witness being forthcoming, the criminative facts against the accused (*n*) were: 1. He had had a quarrel with the deceased a short time previous. 2. He had been heard to declare that he would be revenged on the deceased. 3. A few days before the murder, the accused bought a sword or large knife, which was found near the corpse. 4. Shortly after the murder he was seen at a short distance from the spot, and coming away from it. 5. Marks corresponding with the impressions made by his shoes were traceable near the body. 6. Blood was found on his person soon after the murder. 7. He absented himself from his home immediately after it. 8. He gave inconsistent accounts of where he was on the day it took place. The weakness of any one of these elements, *taken singly*, is obvious, but collectively they form a very strong case against the accused. Now suppose, instead of the above chain of facts, the following evidence was offered: 1. The accused was a man of bad character. 2. He belonged to a people notoriously reckless of human life, and addicted to assassination. 3. On a former occasion he narrowly escaped being convicted for the murder of another person. 4. Much jealousy and ill-feeling existed between his nation and that to which the deceased belonged. 5. On the same spot a year before, one of the latter was murdered by one of the former in exactly the same way. 6. The murderer had also robbed the deceased, and the accused was well known to be avaricious. 7. He had been overheard, in his sleep, to use language implying that he was the murderer (*o*). 8. All his neighbours believed him guilty; or, supposing the case one of public interest, both Houses of Parliament had voted addresses to the crown in which he was assumed to be the guilty party. These and similar matters, however multiplied, could never generate that rational conviction on which alone it is safe to act; and accordingly not one of them would be received as legal evidence.

(*n*) This expression is used in 11 & 12 Vict. c. 46, s. 1; 30 & 31 Vict. c. 35, s. 6.

(*o*) *Infrà*, bk. 3, pt. 2, ch. 7.

§ 93. It may be objected, and, indeed, Bentham's Treatise on Judicial Evidence is founded on the notion, that by exclusionary rules like the above, much valuable evidence is wholly sacrificed (*p*). Were such even the fact, the evil would be far outweighed by the reasons already assigned for imposing a limit to the discretion of tribunals, in declaring matters proved or disproved (*q*). But when the matter comes to be carefully examined, it will be found that the evidence in question need seldom be lost to justice; for, however dangerous and unsatisfactory it would be as the basis of final adjudication, it is often highly valuable as "indicative evidence;" *i. e.*, evidence not in itself receivable, but which is "*indicative*" of better (*r*). Take the case of derivative evidence: a witness offers to relate something told him by A.; this would be stopped by the court; but he has indicated a genuine source of testimony, A., who may be called, or sent for. So a confession of guilt which has been made under promise of favour or threat of punishment is inadmissible by law; yet any facts discovered in consequence of that confession — such, for instance, as the finding of stolen property — are good legal evidence (*s*). Again, no one would think of treating an anonymous letter as legal evidence against a party not suspected of being its author, yet the suggestions contained in such letters have occasionally led to disclosures of importance. In tracing the perpetrators of crimes, also, conjectural evidence is often of the utmost importance, and leads to proofs of the most satisfactory kind, sometimes even amounting to demonstration. It is chiefly, however, on inquisitorial proceedings — such as coroners' inquests, inquiries by justices of the peace before whom persons are charged with offences, and the like — that the use of "indicative evidence" is most apparent, though even these tribunals cannot act on it.

§ 94. The *rules* of evidence are in general the same in civil and criminal proceedings (*t*), and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions. Thus the doctrine of estoppel has a much larger operation in civil proceedings (*u*). So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the

(*p*) See that work, *passim*.

(*q*) *Suprà*, § 90, and Introd. § 38.

(*r*) The phrase "indicative evidence" is used in this sense by Bentham, 1 Jud. Ev. 37, and bk. 6, ch. 11, sect. 4, as well as in his "Principles of Judicial Procedure, &c." ch. 11. sects. 1 and 3. In one place he calls it "evidence of evidence," 3 Jud. Ev. 554.

(*s*) *R.* v. *Lockhart*, 2 East, P. C. 658; *R.* v. *Warickshall*, 1 Leach, C. L. 263; *R.* v. *Gould*, 9 C. & P. 364; *R.* v. *Griffin*, R. & R. C. C. 151.

(*t*) *R.* v. *Burdett*, 4 B. & A. 95, 122, per Best, J.; *R.* v. *Murphy*, 8 C. & P. 297, 306; *Leach* v. *Simpson*, 5 M. & W. 309, 312, per Parke, B.; 25 How. St. Tr. 1314; 29 *Id.* 764.

(*u*) *Infrà*, bk. 3, pt. 2, ch. 7.

credit due to that statement (*x*); whereas in civil cases nothing must be opened to the jury which it is not intended to substantiate by proof (*y*). Again, confessions or other self-disserving statements of prisoners will be rejected if made under the influence of undue promises of favour, or threats of punishment (*z*); but there is no such rule respecting similar statements in civil cases. So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating the burden of proof cannot be followed out in all their niceties when they press against accused persons (*a*).

§ 95. But there is a strong and marked difference as to the *effect* of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision (*b*); but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty (*c*); or, as an eminent judge expressed it, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt" (*d*). The expression "moral certainty" is here used in contradistinction to physical certainty, or certainty properly so called (*e*); for the physical possibility of the innocence of any accused person can never be excluded. Take the strongest case: a number of witnesses of character and reputation, and whose evidence is in all respects consistent, depose to having seen the accused do the act with which he is charged; still the jury only believe his guilt on two presumptions, either or both of which may be fallacious; viz., that the witnesses are neither deceived themselves, nor deceiving them (*f*); and the freest and fullest confessions of guilt have occasionally turned

(*x*) *Infrà*, bk. 4, pt. 1.

(*y*) *Stevens* v. *Webb*, 7 C. & P. 60, 61. *Duncombe* v. *Daniell*, 8 *Id.* 222, 227.

(*z*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*a*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16. See per Lord Kenyon, C. J., in *R.* v. *Hadfield*, 27 How. St. Tr. 1353.

(*b*) Plowd. 412; 1 Greenl. Ev. 13 a, 7th Ed.; MacNally's Ev. 578; *Cooper* v. *Slade*, 6 Ho. Lo. Cas. 772, per Willes, J.

(*c*) See Introd. § 49. The juror's oath seems framed with a view to the above distinction. In civil cases he is sworn "well and truly to try the issue joined between the parties, &c.," whilst in treason or felony his oath is that he "shall well and truly try, *and true deliverance make*, between our sovereign lady the Queen and the prisoner at the bar, &c."

(*d*) Parke, B., in *R.* v. *Sterne*, Surrey Sum. Ass. 1843, MS.

(*e*) Introd. § 6.

(*f*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, Préamb.; 2 Ev. Poth. 332; Rosc. Civ. Ev. 25, 9th Ed.

out untrue (*g*). Even if the jury were themselves the witnesses, there would still remain the question of the identity of the person whom they saw do the deed, with the person brought before them accused of it (*h*); and identity of person is a subject on which many mistakes have been made (*i*). The wise and humane maxims of law, that it is safer to err in acquitting than condemning (*k*), and that it is better that many guilty persons should escape than one innocent person suffer (*l*), are, however, often perverted to justify the acquittal of persons of whose guilt no *reasonable* doubt could exist; and there are other maxims which should not be forgotten: "Interest reipublicæ ne maleficia remaneant impunita" (*m*); "Minatur innocentes, qui parcit nocentibus" (*n*).

§ 96. Again, the psychological question of the *intent* with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim "Actus non facit reum, nisi mens sit rea" (*o*), runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts (*p*); while in civil actions to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief (*q*), — "Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus" (*r*). There are, however, exceptions to this; and whether an act was done *knowingly* often becomes an important consideration in civil actions (*s*). It may be laid down as a general principle, that, provided a man has a right by law to do an act, the intention with which he does it is immaterial (*t*). "Nullus videtur dolo facere, qui suo jure utitur" (*u*). All contracts, likewise, are founded on an intention of the parties, either expressed by themselves or implied by law from circumstances.

§ 97. And here a question presents itself, whether and how far the rules of evidence may be relaxed *by consent?* In criminal cases, at least in treason and felony, it is the duty of the judge to see that

(*g*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*h*) See M. 49 Hen. VI. 19 B. pl. 26.

(*i*) *Infrà*, bk. 3, pt. 2, ch. 6.

(*k*) 2 Hale, P. C. 290.

(*l*) 2 Hale, P. C. 289; 4 Blackst. Comm. 358.

(*m*) Jenk. Cent. 1, Cas. 59. See also 4 Co. 45 a.

(*n*) 4 Co. 45 a. See also Jenk. Cent. 3, Cas. 54.

(*o*) Co. Litt. 247 b; 3 Inst. 107; 4 How. St. Tr. 1403; T. Raym. 423; 7 T. R. 514; 2 East, 104; 1 Den. C. C. 389; 5 Jur., N. S. 649.

(*p*) *Infrà*, bk. 3, pt. 2, ch. 2.

(*q*) M. 6 Edw. IV. 7 B. pl. 18; Hob. 134; T. Raym. 422; Willes, 581; 2 East, 104; 16 M. & W. 442.

(*r*) Bacon, Max. Reg. 7.

(*s*) 4 Co. 18 b; *May* v. *Burdett*, 9 Q. B. 101; *Jackson* v. *Smithson*, 15 M. & W. 563; *Card* v. *Case*, 5 C. B. 622; *Hudson* v. *Roberts*, 6 Exch. 697; *Worth* v. *Gilling*, L.R., 2 C. P. 1.

(*t*) *Oakes* v. *Wood*, 2 M. & W. 791; *Simmons* v. *Lillystone*, 8 Exch. 431; *Ridgway* v. *The Hungerford Market Company*, 3 A. & E. 171.

(*u*) Dig. lib. 50, t. 17, l. 55.

the accused is condemned according to law; and, the rules of evidence forming part of that law, no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statements is given, de facto, if not de jure, to prisoners who are undefended by counsel. So no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the like. Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial, with the view to save the trouble and expense of proving it (*x*). Subject, however, to these and some other exceptions, the general principles, "Quilibet potest renunciare juri pro se introducto" (*y*), "Omnis consensus tollit errorem" (*z*), seem to apply to evidence in civil cases; and much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object, or thinks its reception will be beneficial to his client. It has, however, been held, that where a valid objection is taken to the admissibility of evidence, it is discretionary with the judge whether he will allow the objection to be withdrawn (*a*).

§ 98. Whether the rules respecting the incompetency of witnesses could be dispensed with by consent seems never to have been settled. In *Pedley* v. *Wellesley* (*b*), Best, C. J., said that Lord Mansfield once permitted a plaintiff to be examined with his own consent (*c*); and although some of the judges doubted the propriety of that permission, He (the Chief Justice) thought it was right. In *Dewdney* v. *Palmer* (*d*), where, after a witness had been sworn on behalf of the plaintiff, it was proposed to show by evidence that he was the real plaintiff, the judge refused to allow this course; and his ruling was affirmed by the Court of Exchequer, on the ground that the objection ought to have been taken on the voir dire. But in a subsequent case of *Jacobs* v. *Layborn* (*e*), the same court, consisting of Lord Abinger, C. B., and Rolfe, B., overruled this, and held that objections to competency might be made at any stage of the trial (*f*).

§ 99. All these cases took place before 14 & 15 Vict. c. 99, had rendered the parties to a suit competent witnesses in general. After

(*x*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*y*) Co. Litt. 92 a, 166 a, 223 b; 10 Co. 101 a; 2 Inst. 183; 4 Bl. Com. 316.

(*z*) Co. Litt. 126 a.

(*a*) *Barbat* v. *Allen*, 7 Exch. 609.

(*b*) 3 C. & P. 558.

(*c*) The case here referred to is thought to be *Norden* v. *Williamson*, 1 Taunt. 378, Lord Mansfield being put by mistake for C. J. Mansfield. See per Parke, B., in *Barbat* v. *Allen*, 7 Exch. 612.

(*d*) 4 M. & W. 664.

(*e*) 11 M. & W. 685. See, however, the observations of Parke, B., in *Yardley* v. *Arnold*, 10 M. & W. 145.

(*f*) See *R.* v. *Whitehead*, 35 L. J., M. C. 186.

the passing of that statute, and previous to 16 & 17 Vict. c. 83 (*g*), the question arose whether the wives of such parties were also rendered competent; which, after some conflict of opinion, was resolved in the negative (*h*).

§ 100. We now come to consider the two other remarkable features of the English system of judicial evidence, which were mentioned early in this Part (*i*); namely, the vivâ voce examination of witnesses, and the publicity of judicial proceedings. Our law of evidence bears a general resemblance to other systems, in its safeguards or securities for the truth of testimony, — like them it has its political sanction of truth, an oath or affirmation, its legal forms of pre-appointed evidence, its rules as to the incompetency of witnesses, and, in a few cases, its rules requiring a plurality of witnesses. But of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given vivâ voce, in presence of the party against whom they are produced, who is allowed to "cross-examine" them; *i. e.*, to ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated (*k*). Stories false in toto are comparatively rare (*l*): it is by misrepresentation, suppression of some matters, and addition of others, that a false colouring is given to things; and it is only by a searching inquiry into the surrounding circumstances that the whole truth can be brought to light. Now, although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses, of itself, some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed, that we can expect to obtain the most efficient materials for its detection. He, above all others, is interested in exposing it, and is the person best acquainted, often the only person acquainted, with the facts as they have really occurred. Besides, as the answer to one question frequently suggests another, it is extremely difficult for a mendacious witness to come prepared with his story, ready fitted to meet any question which may be thus put to him on a sudden (*m*).

(*g*) Which rendered husbands and wives competent witnesses for or against each other in civil cases. See *infrà*, bk. 2, pt. 1, ch. 2.

(*h*) See *Stapleton* v. *Crofts*, 18 Q. B. 367; *Barbat* v. *Allen*, 7 Exch. 609, and *M'Nellie* v. *Acton*, 17 Jur. 661.

(*i*) *Suprà*, § 80.

(*k*) Introd. § 24.

(*l*) *Id.* § 26.

(*m*) The advantages of the common-law mode of interrogating witnesses, as compared with that made use of in the civil and canon laws, and formerly in our ecclesiastical and equity courts, &c., are ably shown by Bentham in the 3rd Book of his Judicial Evidence.

The other great check is the *publicity* of our judicial proceedings, — our courts of justice being open to all persons; and in criminal cases the by-standers are even invited by proclamation to come forward with any evidence they may possess affecting the accused. The advantages of this are immense. "In many cases," observes an author who is amply quoted in the present work (*n*), "say rather in most (in all except those in which a witness bent upon mendacity can make sure of being apprised with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. . . . Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a known face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress, may, through some unsuspected channel, burst forth to his confusion."

The practice of the civil (*o*) and canon laws, as is well known, differs wholly from ours in these respects. Witnesses are examined in private by a judge or officer of the court, and their depositions, reduced into form, are transmitted to the tribunal by which the cause is to be tried. And this system, with a few modifications, prevailed in the courts of equity before the Judicature Acts (*p*). Nor have there been wanting those who condemn our common-law system altogether, and contend that secrecy and written deposition constitute the very essence of justice. All their arguments, however, when examined, come to this, that it is wise to sacrifice certain and constant good, in order to avoid occasional and exceptional evil. Where, say they, witnesses are called on to explain their answers, and one question is followed up by another, a false witness *may* adapt his answers to circumstances; *therefore*, let every witness who happens to be misunderstood — all men are not masters of language, and in the hands of the ablest of us it often fails to communicate our thoughts — be deprived of the opportunity of setting himself right with his interrogator and the tribunal. Again, an honest but timid or weak-minded witness *may* be so affected by the

(*n*) 1 Benth. Jud. Ev. 552. See that work, bk. 2, ch. 10, sect. 2, where the advantages of the publicity of judicial proceedings are very clearly pointed out.

(*o*) By the civil law is meant that form of Roman law which, during so many centuries, prevailed on the continent of Europe. The practice of the ancient Romans in a great degree resembled our own. See Acts, xxv. 16; Dig. lib. 22, tit. 5, l. 3, §§ 3 and 4; Quintilian, Inst. Orat. lib. 5, cap. 7, and Devot. Inst. Canon. vol. 2, lib. 3, tit. ix. §§ 17 and 18, 5th Ed.

(*p*) See the modifications traced *infrà*, p. 110.

novelty of his situation, or so browbeaten by his cross-examiner, as to be unable to give evidence, or he may perhaps be made even to contradict himself; *therefore*, say the partisans of the civil and canon law practice, let the feeling of shame that so often deters men from stating in public falsehoods which they would unblushingly state in private, be erased from the minds of all witnesses who present themselves in courts of justice; and let us shut out the incalculable light thrown on every sort of verbal testimony by the demeanour of the person who gives it. The most limited experience will testify that *what* a man says is often of very small account indeed, compared with his *manner* of saying it. Besides, when justice is defeated by cross-examination pushed to excess, the chief fault rests with the judge, whose duty it is to reassure and encourage the witness. And, after all, browbeating and annoying a witness are very different from discrediting him. We should remember that the cross-examination takes place in presence of a judge and jury, who are on the watch to discover whether the confusion or vacillation of the witness is attributable to false shame, mistake, or mendacity. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other, — a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

§ 101. But however valuable the principle which requires the presence of witnesses at a trial, the strict enforcement of the rule, under all circumstances, would be an impediment to justice. Especially would this impediment arise in cases where the absence of a witness beyond the sea made his attendance practically, or sometimes absolutely impossible. Either from the evils of an unbending adherence to the rule, it being less felt in early times, or from the comparatively slender attention paid to evidence in general by our ancient lawyers, certain it is that the common law made little or no provision on this subject; but large improvements have been effected by modern legislation. After the union with Scotland and the complete establishment of our Indian empire, the mischiefs arising out of the imperfections of the ancient system became too great to be overlooked; and the 13 Geo. 3, c. 63, contains several provisions directed to this object. In the first place, it enacts (*q*) that in all cases of indictments, laid in the Court of King's Bench, for *misdemeanours committed in India*, the said court may, upon motion on behalf of the prosecutor, or defendant, by writ of mandamus,

(*q*) Sect. 40.

require certain judges in India therein mentioned, to hold a court for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments; the examination to be publicly taken vivâ voce in the said court and afterwards, by some sworn officer of such court, reduced into writing, and sent to the Court of King's Bench, and there allowed and read, and deemed as good and competent evidence as if such witness had been examined in the said Court of King's Bench itself. And by a subsequent section (*r*), when any person shall commence any action, for which cause shall *arise in India*, in any of His Majesty's courts at Westminster, such courts respectively may, upon motion there to be made, award similar writs to the same judges in India, for the examination of witnesses "as aforesaid," and for the reading, &c., of such examination at the trial of the action in this country. Another section (*s*) contains a proviso that "no such depositions, taken and returned as aforesaid by virtue of this Act, shall be allowed or permitted to be given in evidence in any capital cases, other than such as shall be proceeded against in Parliament."

§ 102. This statute, it is obvious, went but a short way towards remedying the evil; and several others with similar provisions — as, for instance, the 42 Geo. 3, c. 85, and 1 Geo. 4, c. 101 — were passed from time to time, to meet the exigencies of certain classes of cases. Nothing generally effectual was done, however, until the passing of 1 Will. 4, c. 22, entitled "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise." The first section enacts that all the powers, &c., contained in 13 Geo. 3, c. 63, relating to the examination of witnesses in India, shall be extended to all colonies, &c., under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein, and to all actions in any of the courts of law at Westminster, in what country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under the commission will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for.

§ 103. The 1 Will. 4, c. 22, contained, however, other provisions more important and extensive than this. It empowered (*t*) each of the courts at Westminster, and the several judges thereof, in every

(*r*) Sect. 44. (*s*) Sect. 45. (*t*) Sect. 4.

action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master of the court, or other person to be named in the order, of any witnesses within the jurisdiction of the court, or to order a commission to issue for the examination of witnesses on oath *at any place out of such jurisdiction*, by interrogatories or otherwise, and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending as without, and all other matters and circumstances connected with such examinations, as might appear reasonable and just (*u*). The examination is directed to be on oath, or affirmation in cases where the law allows an affirmation; and persons giving false evidence are to be deemed guilty of perjury (*x*). But, lest the power of examining witnesses in this way should be perverted, to the superseding of the salutary practice of the common law, it was provided (*y*), that "no deposition, to be taken by virtue of the Act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear (1) that the deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; and (2) that the accused was *present* at the examination and had an opportunity of cross-examining the deponent, — which second proviso, by a long and cumbrous amending enactment (*z*), is cut down by the qualification that it shall be sufficient if the accused had *notice* of the examination and might have had opportunity of cross-examining."

§ 104. Still further improvements in this respect were effected by 6 & 7 Vict. c. 82, which provided means for compelling the attendance of persons to be examined under commissions for the examination of witnesses, &c., which were to be executed in parts of the realm, subject to different laws from those in which the commissions were issued; and by the 22 Vict. c. 20, which provided for taking evidence in suits and proceedings before tribunals in the Queen's dominions, in places out of the jurisdiction of those tribunals. Again, by the 22 & 23 Vict. c. 21, s. 16, the above provisions of the 13 Geo. 3, c. 63, and the 1 Will. 4, c. 22, were extended to all suits and proceedings on the Revenue side of the Court of Exchequer.

(*u*) In applying this section, the court may disallow any interrogatories which, in their opinion, might deter a witness from giving evidence before the commissioners; or, after a commission has been granted, and before its execution, they may disallow any cross-interrogatories which they may think to be improper. *Stocks* v. *Ellis*, L. Rep., 8 Q. B. 454.

(*x*) Sect. 7.

(*y*) Sect. 10.

(*z*) 30 & 31 Vict. c. 35, s. 6.

And now, by the Rules of the Supreme Court (*a*), after prescribing that at the trial of any action or at any assessment of damages, the witnesses shall, in the absence of agreement between the parties, be examined vivâ voce and in open court, it is also prescribed that, "the court or a judge may, at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable; or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise, before a commissioner or examiner; provided, that where it appears to the court or judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

§ 105. The old statutes 1 & 2 P. & M. c. 13, s. 4, and 2 & 3 P. & M. c. 10, s. 2, enacted, that justices of the peace, before whom persons were brought charged with felony, should, before committing to prison or admitting to bail, take the examination of the prisoner, and information of those that brought him, of the fact and circumstances thereof; and the same, or so much thereof as should be material to prove the felony, should put in writing, &c. These statutes were repealed, re-enacted, and their provisions extended to cases of misdemeanour, by 7 Geo. 4, c. 64, ss. 2, 3. And this latter enactment was in its turn repealed and amended by 11 & 12 Vict. c. 42; which enacts (*b*), that where witnesses are examined on oath or affirmation, against a person charged before a justice of the peace with any indictable offence, and their evidence has been put into writing, and their depositions read over to, and signed respectively by them and the justice taking the same, "If upon the trial of the person so accused it shall be proved, by the oath or affirmation of any credible witness, that any person whose depositions shall have been so taken as aforesaid is dead, or so ill as not to be able to travel (*c*), and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to

(*a*) R. S. C. Ord. XXXVII. Rule 1.

(*b*) Sect. 17.

(*c*) A suggestion that, owing to the old age and nervousness of the witness, his being examined in court might be attended with danger, is not a sufficient ground within this section for allowing his deposition to be read. *Reg.* v. *Farrell*, 43 L. J., M. C. 94.

read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The 1 & 2 P. & M. c. 13, s. 5, and 7 Geo. 4, c. 64, s. 4, give somewhat similar directions to coroners holding inquisitions of murder or manslaughter; and the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 270, has some provisions of a like nature for offences under that Act.

§ 106. Nor is it exclusively on witnesses that this institution of publicity exercises a salutary control. Its effect on the judge is no less conspicuous. "Upon his moral faculties," observes Bentham (*d*), "it acts as a check, restraining him from active partiality and improbity in every shape; upon his intellectual faculties it acts as a spur, urging him to that habit of unremitting exertion without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial. Under the auspices of publicity, the original cause in the court of law and the appeal to the court of public opinion are going on at the same time. So many by-standers as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness; so many ready executioners, so many industrious proclaimers, of his sentence. On the other hand, suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, — that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. . . . Publicity is farther useful as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if on pretence of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defence. . . . Another advantage (collateral, indeed, to the present object, yet too extensively important to be passed over without notice) is that, by publicity, the temple of justice adds to its other functions that of a school, a school of the highest order, where the most important branches of morality are enforced by the most impressive means; a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without

(*d*) 1 Jud. Ev. 523-525.

being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice."

§ 107. It has not been unfrequently suggested that this general rule of publicity should be subject to an exception in the cases where, as in the Divorce Court or on trials for rape and similar offences, the evidence given must necessarily be of an indecent character; the exception, however, being sought to be introduced more for the sake of the general readers of newspaper reports of the proceedings than of those who actually hear the evidence given. The Divorce Court, following the practice of the ecclesiastical courts, will hear suits for a decree of nullity of marriage in camerâ (*d'*), and also suits for restitution of conjugal rights (*d''*), but has no power so to hear suits for dissolution of marriage (*d'''*). On the occasion of a trial for rape or some similar offence, women and boys are frequently, and it seems lawfully, excluded from court; but when the Criminal Law Amendment Bill was passing through the House of Commons in 1885, a clause giving the judge an express power to order such exclusion was rejected. On the whole, it is submitted that secret trials are so great an evil, from the suspicion of injustice to which they may give rise, that it is better not to exclude the public, and that the object aimed at would be sufficiently gained by establishing a supervision over newspaper reports.

(*d'*) *C.* v. *C.*, 38 L. J., P. & M. 37.
(*d''*) *A.* v. *A.*, L. R., 3 P. 230.
(*d'''*) *C.* v. *C.*, *ubi sup.*

AMERICAN NOTES.

(§ 82) Matter of Law. — That "matter of law" is distinguished from "matter of fact," in accordance with the different functions of judge and jury, does not seem entirely accurate. All questions of law (except, perhaps, to a limited extent in criminal causes) are for the court; all questions of fact are not for the jury. Certain facts are, more or less generally, for the determination of the court. U. S. *v.* Battiste, 2 Sumn. 240, 243, Story, J.; State *v.* Hodge, 50 N. H. 510, 522; Com. *v.* Anthes, 5 Gray (Mass.), 185; Duffy *v.* People, 26 N. Y. 588, 591; Robbins *v.* State, 8 Oh. St. 131; Batre *v.* State, 18 Ala. 119. But see State *v.* Croteau, 23 Vt. 14; Nelson *v.* State, 2 Swan, 482, 486; State *v.* Jurche, 17 La. An. 71, *contra*.

Thus, where the facts are settled, the existence of *negligence* is a question of law, though reference is thereby implied to a standard of reasonable care and common experience with which the judge must often necessarily be unacquainted. R. R. Co. *v.* Stout, 17 Wall. 657; Joslin *v.* LeBaron, 44 Mich. 160; Woodward *v.* Hancock, 7 Jones (N. C.), 384; Walker *v.* Stetson, 14 Oh St 89, 101; Mauermann *v.* Siemerts, 71 Mo. 101; L. S. & M. S. Ry. Co. *v.* Bangs, 47 Mich. 470. But see Williams *v.* Greeley, 112 Mass. 79, to the effect that where the circumstances are complicated or in dispute the question of negligence is one for the jury. See also Penn. Co. *v.* Conlan, 101 Ill. 93; Randall *v.* Conn. Riv. R. R., 132 Mass. 269; Teipel *v.* Hilsendegen, 44 Mich. 461. So whether sufficient

notice has been given of dishonor. Bank of Upper Canada *v.* Smith, 4 Q. B. U. C. 483; But question of reasonable time is said to be for the jury. Jenkins *v.* Lykes, 19 Fla. 148. Court can say, as matter of law, whether certain facts constitute a lottery. Com. *v.* Sullivan, 146 Mass. 142.

The existence of reasonable and probable cause is for the court, the facts being ascertained by the jury. Newell *v.* Downs, 8 Blackf. 523; Taylor *v.* Godfrey, 36 Me. 525; Carpenter *v.* Shelden, 5 Sandf. 77; Jacks *v.* Stimpson, 13 Ill. 701; Ash *v.* Marlow, 20 Ohio, 119; Barron *v.* Mason, 31 Vt. 189; Stewart *v.* Sonneborn, 98 U. S. 187; Bacon *v.* Towne, *et al.*, 4 Cush. 217, 238. The meaning of words, or a collocation of words, is to be determined by the court, the circumstances of the case being first ascertained by the jury. Morse *v.* Weymouth, 28 Vt. 824; Atty.-Gen. *ex rel. v.* Dublin, 38 N. H. 459, 523; Allen *v.* Frost, 62 Ga. 659; Globe Works *v.* Wright, 106 Mass. 207, 216. So all facts preliminary to the admissibility of evidence are for the court. State *v.* Tilghman, 11 Ired. (N. C.) Law, 513; Com. *v.* Coe, 115 Mass. 481; Jones *v.* Tucker, 41 N. H. 546. So the qualifications of an expert are for the court. State *v.* Cole, 94 N. C. 958; Preeper *v.* Reg., 15 Sup. Ct. Can. 401. So whether a confession is voluntary. Ellis *v.* State, 65 Miss. 44. So as to the question as to who has possession of an original deed. Bell *v.* Kendrick, 25 Fla. 778. So question as to whether a witness feels the solemnity of an oath. Com. *v.* Lynes, 142 Mass. 577. The court may, in its discretion, allow the instruction of the witness during an adjournment for that purpose. Ibid. Finding of court in this respect may be reviewed on appeal. Udy *v.* Stewart, 10 Ont. Rep. 591. So the intelligence of a witness is a fact within the discretion of the judge. Com. *v.* Mullins, 2 All. 295; Simpson *v.* State, 31 Ind. 90; Peterson *v.* State, 47 Ga. 524. Or the use of an interpreter. State *v.* Severson, 78 Ia. 653. But with the weight of evidence the court has, in general, no concern. Presumptions of fact are to be weighed by the jury. Prowattain *v.* Tindall, 80 Pa. St. 295; Nelson *v.* Vorce, 55 Ind. 455; Angelo *v.* Faul, 85 Ill. 106; Green *v.* Cochrane, 43 Ia. 545; Wessels *v.* Beeman, 87 Mich. 481; State *v.* Smallwood, 75 N. C. 104; Shellabarger *v.* Nafus, 15 Kans. 547. See also Husted *v.* O'Donnell, 118 Mass. 424; Hicks *v.* Silliman, 93 Ill. 255. But court can say whether there is any evidence for the jury. Sidney &c. Co. *v.* Warsaw, 122 Pa. St. 494; State *v.* McBryde, 97 N. C. 393. (See § 81, *supra.*) Tainted evidence, that of accomplices, and the like, is merely matter for judicial comment. Underwood *v.* McVeigh, 23 Gratt. 409; Paulette *v.* Brown, 40 Mo. 52; Callanan *v.* Shaw, 24 Ia. 441; Mead *v.* McGraw, 19 Oh. St. 55; Collins *v.* People, 98 Ill. 584. Where the court forgets the evidence, the question can be submitted to the jury. Spence *v.* Baxter, 95 N. C. 170. The rules with regard to negligence, reasonable and probable cause, and the like, are apparently explainable on historical grounds. The court, entirely apart from these rules, has a wide range of reserved powers, to be exercised at its discretion as presiding officer, for the general purpose of securing fair trials. For example, it may order the separation of witnesses. Failure to obey does not apparently deprive the party of the benefit of the evidence. Black *v.* Besse, 12 Ont. Rep. 522; Bulline *v.* Peo., 95 Ill. 394; Hanvey *v.* State, 68 Ga. 612. "Contempt of court" is a matter of judicial discretion. Marr *v.* Marr, 3 C. P. U. C. 36. So the court may order the trial of experiments in open court. Probert *v.* Phipps, 149 Mass. 258. Order of evidence is discretionary with the court. Territory *v.* O'Donnell, 4 N. M. 66; Ripley *v.* Arledge, 94 N. C. 467; Peo. *v.* Tidwell, 4 Utah, 506; Olive *v.* Olive, 95 N. C. 485; Chamberlin *v.* Fuller, 59 Vt. 247. The construction of written documents is for the court. R. R. *v.* McKenna, 13 Lea, 280.

(§ 87) The Best Evidence. — (*a*) *Assumed Scope of Rule.* — The rule here stated, "the best evidence is to be given which the nature of the case permits" (conf. Greenl. Ev. §§ 82–97), is regarded by the learned author as a leading principle in the English law of evidence. It is assumed throughout the present work (conf. §§ 62, 80, 88, 293, 590, *et passim*) to be a well-defined rule, in accordance with which most of the admissions and exclusions of evidence are established and maintained. The rule has had a wide vogue, but it may be doubted whether any principle so philosophical and invariable has determined the present form of a branch of law eminently utilitarian, and largely moulded by its historic development, the common sense of judges and legislators, or the practical requirements of judicial legislation. With a recognized exception (stated in (*b*) of

this note), it is certain that no such deep reaching principle obtains to-day. Carpenter *v.* Dame, 10 Ind. 125, 132.

The rule, moreover, as given above, is ambiguous. It is either a rule of indulgence or one of requirement. It means either (1) the best evidence which the nature of the case permits *may* be given; or (2) such evidence *must* be given. Neither proposition is true. (1) It is not true that evidence is admissible simply because it is the best possible in the nature of the case. Hearsay, for example, may be, and often is, not only the best, but the only evidence. The witnesses may be unavailable, — they may be dead; but unless their evidence falls within a recognized exception, it is rejected. See § 492, n. 1. Reeves *v.* State, 7 Tex. Ct. App. 276. (2) Neither is it true that the best possible evidence must be offered. The offering of evidence which, in the nature of things, presupposes the existence of better evidence which is not offered, is good ground for caution or comment; it affects the weight of the evidence. But it by no means follows that it is to be rejected. No one is, it seems, compelled to offer a certain amount or quality of evidence by excluding relevant evidence actually offered. If the best at command be not offered, and the fact brings defeat, it is difficult to say that any rule of law has been violated by so doing. Waller *v.* School Dist., 22 Conn. 326; Carr *v.* Miner, 42 Ill. 179; Minor *v.* Tillotson, 7 Peters, 99; Shoenburgher *v.* Hockman, 37 Pa. St. 87; Wing *v.* Abbott, 28 Me. 367. Conf. Bank U. S. *v.* Dandridge, 12 Wheat. 64, 70; Wilcox *v.* Smith, 5 Wend. 231, 234; Cabot *v.* Given, 45 Me. 144; Mordecai *v.* Beal, 8 Porter (Ala.), 529; Bagley *v.* McMickle, 9 Cal. 430. Thus the fact that a more credible witness could have been called is no ground for rejecting one less so. State *v.* Cain, 9 W. Va. 559; Governor *v.* Roberts, 2 Hawks, 26; Green *v.* Cawthorn, 4 Dev. L. 409; Stevenson *v.* State, 83 Ga. 575. So evidence will be received of words spoken, though the speaker is present in court, and not called as a witness. Badger *v.* Story, 16 N. H. 168; Featherman *v.* Miller, 45 Pa. St. 96. There has, however, been manifested a strong tendency to reject evidence which clearly indicates the source from which a better grade of evidence can be obtained. Hilts *v.* Colvin, 14 Johns. 182; Battles *v.* Holley, 6 Greenl. 145; Cook *v.* Wood, 1 McCord, 139; Lyons *v.* Gregory, 3 Hen. & Munf. 237; Lowry *v.* Cady, 4 Vt. 504; Doe *v.* Greenlee, 3 Hawks, 281; Cornet *v.* Williams, 20 Wall. 226; Holmes *v.* Coryell, 58 Tex 680; Jaques *v.* Horton, 76 Ala. 238; Parliman *v.* Young, 2 Dak. 175; Wimer *v.* Smith, 22 Oreg. 469; Western Union Co. *v.* Stevenson, 128 Pa. St. 442; Cumberland Ins. Co. *v.* Giltinan, 48 N. J. L. 495. So it has been held that parol evidence of birth is not admissible until failure to produce baptismal register is accounted for. Hartigan *v.* Ins. Co., 8 L. C. Jur. 203.

(*b*) *Present Scope of Rule.* — There is one well-recognized rule which approaches the "best evidence" rule, and is still in force. In proving the contents of a writing, the writing itself must be shown, in the absence of legal excuse. In other words, parol evidence of the contents of a written instrument can only be introduced after satisfactorily accounting for failure to produce the original. (Conf. § 215, n. 1, c. iii. (*a*), *infra*.) Howe *v.* Fleming, 123 Ind. 262; Barmby *v.* Plummer, 29 Neb. 64; Morrison *v.* Jackson, 35 S. C. 311; Phillips *v.* Trowbridge Co., 86 Ga. 699; Mercier *v.* Harnan, 39 La. An. 94; Mullanphy Bank *v.* Schott, 135 Ill. 655; Perrin *v.* State, 81 Wis. 135; Sebree *v.* Dorr, 9 Wheat. 558; Hart *v.* Yunt, 1 Watts, 253. See Hilts *v.* Colvin, 14 Johns. 182; Doe *v.* Greenlee, 3 Hawks, 281; Harvey *v.* Thorpe, 28 Ala. 250; Wallace *v.* Townsend, 109 Mass. 263. In proving contents the witness is only responsible for the best recollection he has. McGibbon *v.* Burpee, 25 New Bruns. 81. As to what is the original document in a telegraphic message, see Durkee *v.* Vt. Cen. R. R., 29 Vt. 127; Telegraph Co *v.* Collins, 45 Kans. 88; Prather *v.* Wilkens, 68 Tex. 187. Proof of inability to produce the original document must be reasonably strong under the facts of the case. Minor *v.* Tillotson, 7 Peters, 99; Wing *v.* Abbott, 28 Me. 367; Waller *v.* School Dist., 22 Conn. 326; Carr *v.* Miner, 42 Ill. 179; Barto *v.* Morris, Cochran, 90; Songster *v.* Paysant, 2 Thom. 408; Glen Brick Co. *v.* Shackell, 14 L. C. Jur. 238, Kearney *v.* Mayor, 92 N. Y. 617; Williams *v.* Grey, 23 C. P. U. C. 561. But see U. S. *v.* Sutter, 21 How. 170, 175. Where original is out of the jurisdiction, its non-production is sufficiently accounted for. R. R. *v.* Schaffer, 76 Ala. 233; R. R. *v.* Gernan, 84 Tex. 141; Manning *v.* Maroney, 87 Ala. 563. But see Wiseman *v.* R. R., 20 Oreg. 425, *contra*. Documents collateral to the

issue are provable by parol. Coonrod *v.* Maddon, 126 Ind. 197. Rule does not apply where the existence rather than the contents is the fact to be proved. Ayers *v.* Chisum, 3 N. M. 52. It is said to apply to documents used to refresh memory. Jones *v.* Jones, 94 N. C. 111. Documents in possession of other party are satisfactorily accounted for by failure to produce upon reasonable notice. Heward *v.* McDougall, 3 U. C. Jur. O. S. 647. Such notice is not necessary where the suit itself is notice. R. R. *v.* Cronin, 38 Oh. St. 122. Or where the other side claim under the document itself. Izlar *v.* Haitley, 23 S. C. 382. In all cases where a sufficient foundation has been laid to admit secondary evidence is a question for the court. Stevens *v.* Miles, 142 Mass. 571.

(1) It is probable that a parol extrajudicial *admission* of the contents of a written instrument is primary evidence of the contents of such instrument as against the party making such admission. 1 Greenl. Ev. §§ 96, 203; Loomis *v.* Wadhams, 8 Gray, 557; Smith *v.* Palmer, 6 Cush. 513, 520. But see *contra*, Jenner *v.* Joliff, 6 Johns. 9; Welland Canal *v.* Hathaway, 8 Wend. 480; Hoefling *v.* Hambleton, 84 Tex. 507. (2) There are, it seems, no recognized degrees of secondary evidence concerning the contents of a private document. A private copy is as *admissible* as an official one; parol evidence is as admissible as either. The difference lies, not in admissibility, but in weight and value. State *v.* Halstead, 73 Ia. 376; Powell *v.* Wallace, 44 Kans. 656; Gilbert *v.* Maline Plough Co., 119 U. S. 491; Harvey *v.* Thorpe, 28 Ala. 250; Renner *v.* Bank of Columbia, 9 Wheat. 582, 587; Den *v.* McAllister, 2 Halst. 46, 53; U. S. *v.* Britton, 2 Mason, 464, 468; Jackson *v.* Vail, 7 Wend. 125. As to what constitutes a document within the meaning of the "best evidence" rule, conf. § 215, n. 1, A, *infra*. As to how far a written instrument can be *varied* by parol, see § 226, n. 1, *infra*.

PART II.

HISTORY OF THE RISE AND PROGRESS OF THE ENGLISH LAW OF EVIDENCE: WITH ITS ACTUAL STATE AND PROSPECTS.

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§ 108. It is proposed, in the present Part, to trace the rise and progress of the law of evidence in this country, concluding with some observations on its actual state and prospects (*a*).

§ 109. On the first of these subjects little is to be found in our modern works, beyond a few dicta, not very consistent with each other. In the case of *R.* v. *The Inhabitants of Eriswell* (*b*), decided in Trinity Term, 1790, Lord Kenyon, C. J., is reported to have said, "The rules of evidence have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded." And in *Bauerman* v. *Radenius* (*c*), about eight years later, he informs us that at the beginning of the eighteenth century, Lord Macclesfield said that the most effectual

(*a*) For a history of evidence in other countries, see Le Gontil's "Essai Historique sur les Preuves," &c., published at Paris in 1863.

(*b*) 3 T. R. 707, 721.

(*c*) 7 T. R. 663, 667.

way of removing landmarks would be by innovating on the rules of evidence; and so he said himself. This, however, is not the general opinion of the present day, in which our system of judicial evidence is commonly spoken of as something altogether modern; and in the case of *Lowe* v. *Jolliffe* (*d*), decided not quite thirty years previous to that first quoted, Lord Mansfield, C. J., is reported to have declared on a trial at bar that the court "did not then sit there to take its rules of evidence from Siderfin and Keble," whose reports begin about a century before the time when he was speaking. In the proceedings against Queen Caroline, in the year 1820 (*e*), Abbott, C. J., in delivering the answer of the judges to a question put by the House of Lords, said, "in their judgment it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument, if it be in existence, are to be proved by the instrument itself, and not by parol evidence."[1] On the other hand, in the work on evidence by Messrs. Phillipps and Amos (*f*), published in 1838, it is said that the law of evidence, according to which the determinations of the courts are at present governed, has been almost entirely created since the time of the reporters Lord Raymond, Salkeld, and Strange; *i. e.*, since a period beginning shortly after the revolution of 1688, and ending at a tolerably advanced point in the reign of Geo. II. Also, in the 10th ed. of Phillipps on evidence, published in 1852 (*g*), it is stated that the important rule rejecting hearsay or second-hand evidence is not of great antiquity; and that one of the earliest cases in which it was acted upon is *Samson* v. *Yardly*, P. 19 Car. II., 2 Keb. 223.

§ 110. The truth seems to be, that while "The Law of Evidence" is the creation of comparatively modern times, most of the leading principles on which it is founded have been known and admitted from the earliest; and in order to show the nature of the ancient, as well as the advantages of the modern system, it will be necessary to examine those principles.

§ 111. All rules respecting judicial evidence may be divided into *primary* and *secondary*, — the former relating to the *quid probandum*, or thing to be proved, the latter to the *modus probandi*, or mode of proving it. Of the former there are but three: 1st. That the evidence adduced must be directed solely to the matters in dispute;

(*d*) 1 W. Blackst. 366.
(*e*) 2 B. & B. 289; see *infrà*, bk. 3, pt. 2, ch. 3.
(*f*) Page 335.
(*g*) Vol. 1, p. 165.

[1] See § 215, n. 1, c. iii. (*a*), *infra*.

2nd. That the burden of proof lies on the party who would be defeated, supposing evidence were not given on either side; and 3rd. That it is sufficient for the party on whom the burden of proof lies, to prove the substance of the issue raised. These rules are so obviously reasonable and necessary for the administration of justice that it would be difficult to find a system in which they have not at least a theoretical existence, however their effect may occasionally have been extended or narrowed by artificial and technical reasoning; and accordingly they have always been recognised in our own (*h*).

The secondary rules are necessarily more numerous, but there are some almost as obvious and universal as the primary. Probably no code of laws ever existed which was destitute of its estoppels, presumptions, and oaths, or other sanctions of truth, or which neglected to establish the great principle, so essential to the peace of society, that matters and claims which have been once regularly and judicially decided, must be considered as settled and not again be brought into dispute. Of all these likewise we find ample mention in our early books (*i*); especially of estoppels, the doctrine of which, as observed by a late able writer, was once tortured into a variety of absurd refinements (*j*).

(*h*) That the proof should be confined to the issues raised, and consequently that the admissibility of evidence depends on the state of the pleadings, see Finch, Comm. Laws, 61; the cases from the Year Books collected in 2 Rol. Abr. 676, 677, pl. 8, 10, 11, 13, 14, 24, 28, &c.; and those put by Bradshawe, A. G. *arguendo*, in *Reniger* v. *Fogassa*, Plowd. 7. Again, that the burden of proof lies in general on the party who asserts the affirmative has been a recognised maxim of law from the earliest periods, see Bract. lib. 4, c. 7, fol. 301 B.; F. N. B. 106, H.; Co. Litt. 6 b; 2 Inst. 662; 4 Inst. 279; 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2; *Anon.*, Littl. R. 36; and the maxim, "actori incumbit onus probandi," seems also to have been well known in former times; 4 Co. 71 b; Hob. 103. A case of the burden of proof shifting is given by Glanville, lib. 10, c. 12. Also, that it is sufficient to prove the substance of the issue, see Litt. ss. 483, 484, 485; 6 Edw. III. 41 b, pl. 22; 8 Edw. III. 70 a, pl. 37; Hob. 73, 81; Tryals per Pais, 140, Ed. 1665; Co. Litt. 227 a; 281 b, 282 a, &c.

(*i*) See Glanv. lib. 12, c. 24, who wrote in the reign of Hen. II.; *Odo de Compton's case*, Memor. in Scac. 29 Edw. I.; 6 Edw. III. 45 a, pl. 31; and the title "Estoppel" in the indexes to our old books, beginning with the Year Book of Edw. II. As instances of presumptions, or intendments of law, noticed by ancient authorities, see Fleta, lib. 6, c. 34, §§ 4 and 5; Bract lib. 1, c. 9, § 4; Litt. ss. 99 and 103; Co. Litt. 42 a and b, 67 b, 78 b, 99 a, 232 b, 373 a and b; 5 Co. 98 b; 6 Co. 76 a; 10 Co. 56 a; 12 Co. 4 and 5; Cro. Eliz. 292, pl. 2; Cro. Jac. 252, pl. 6 and 451, pl. 29; Cro. Car. 317, pl. 14, and 550, pl. 2. It is well known that during the middle ages oaths were in constant use, or rather abuse, throughout Christendom, including this country, which always insisted on an oath as a test of truth, and had its judicial purgation under the name of wager of law. And with respect to the authority of res judicata, by the old statute, 4 Hen. 4, c. 23, it is ordained and established, that "after judgment given in the courts of our lord the king, the parties and their heirs shall be thereof in peace, until the judgment be annulled (anientiz) by attaint or by error, if there be error, as hath been used by the law in the times of the progenitors of our said lord the king." See also the stat. West. 2 (13 Edw. 1, stat. 1), c. 5, s. 2.

(*j*) 2 Smith's Lead. Cases, 607, 4th Ed.

§ 112. Many of the other secondary rules of evidence are based on principles which, though quite as consonant to reason, and as much required for a perfect administration of justice, are not so obvious at first sight; and which, owing to the hardship of their enforcement in particular cases, and the great discretion required in their application, are sometimes apt to be disregarded. Among these may be reckoned the just principle, "res inter alios acta alteri nocere non debet," — that persons are not to be affected by the acts or words of others, to which they were neither party nor privy, and consequently had no power to prevent or control. We find this appealed to as a recognised maxim of law so early as the reign of Edward II. (*k*).[1] Under this head comes the great principle, the strict enforcement of which (as has been already stated (*l*)) forms a distinguishing feature of the English law of evidence; namely, the rejection of all transmitted or derivative evidence, — of all proof offered second-hand, or *obstetricante manu*. We have seen the observations of Lord C. J. Abbott as to that branch of this rule which relates to written instruments (*m*); and with respect to hearsay or second-hand evidence in general, our ancient lawyers seem to have had a thorough perception of its infirmity. Thus, Sir Edward Coke, in the early part of the seventeenth century, lays down as a rule of law, "Plus valet unus oculatus testis, quam auriti decem," "Testis de visu præponderat aliis" (*n*). So, the judges having held in *Thomas's case* that the statutes 1 Edw. 6, c. 12, s. 22, and 5 & 6 Edw. 6, c. 11, s. 12, which

(*k*) M. 3 Edw. II. 53, tit. Entre; A writ of entry ad terminum qui præteriit was brought, in which the demandant alleged that the tenant had right of entry only through A., his father, who leased to him the term, &c.; to which the tenant pleaded that the plaintiff was bastard, and could not claim as heir to A.; to which the demandant replied that he had formerly sued a writ against one C., who pleaded the bastardy of the demandant, who thereupon sued out a writ to the Bishop of L——, who certified to the court that he was mulier, &c. To this the tenant rejoined that he was no party to that proceeding, and *res inter alios acta aliis, &c.* To this it was answered that that maxim did not apply to such a case. The judges took time to consider until the next term, and then gave judgment that, as that court had been certified of the demandant's state of mulier by a certification, which was completed by a judgment given under that certification, and as he who is once mulier is mulier for ever, no matter between whom it be; they gave judgment that he was entitled to seisin, &c. See on this subject, Co. Litt. 352 b; 2 Smith's Lead. Cas. 614, 4th Ed. The above case was decided exactly 350 years before the first case in Siderfin, while the reports of Keble begin a year later, — the two reporters whose authority on the subject of evidence Lord Mansfield, 1 W. Bl. 366, wished to consign to oblivion, on account of their *antiquity*. See also 2 Inst. 513. The rule "res inter alios, &c." was well known at Rome. See Cod. lib. 7, tit. 60, ll. 1 and 2, in the latter of which it is spoken of as being "notissimi juris." *Infrà*, bk. 3, pt. 2, ch. 5.

(*l*) Introd. § 29, and *suprà*, pt. 1, § 89. See *infrà*, bk. 3, pt. 2, cc. 3 and 4.

(*m*) *Suprà*, § 109. See Fleta, lib. 6, ch. 34, § 1, and 6 Mod. 248. This principle was also known to the Romans. Dig. lib. 22, tit. 4, l. 2, lib. 26, tit. 7, l. 57; Cod. lib. 4, tit. 21, ll. 5, 7, and 11; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 2, §§ x. and xi.

(*n*) 4 Inst. 279.

[1] See § 506, n. 1, *infra*.

require that no person be proceeded against for treason except on the oath of two lawful accusers, were satisfied by the evidence of one person who spoke of his own knowledge, and that of another who had the information from a third, and he from a fourth, to whom the first had related it (*o*), the same authority pronounces it "a strange conceit that one may be an accuser by hearsay;" and says that the doctrine was utterly denied by the judges in *Lord Lumley's case* (*p*), H. 14 Eliz., a report of which he had seen in the handwriting of C. J. Dyer (*q*); and *Thomas's case* is also mentioned by Sir Matthew Hale as overruled (*r*). As our legal history advances, the authorities become more distinct on this subject, and the inconclusiveness of hearsay or second-hand evidence seems to have been universally recognised during the latter half, at least, of the seventeenth century (*s*). Instances are to be seen in the state prosecutions of that period (*t*); and we sometimes find the objection taken even by persons not in the legal profession. Thus Archbishop Laud, in his defence, observes of some evidence offered against him, that it is "hearsay" (*u*); and Lord William Russell, complaining on his trial that he thought he had very hard measure, that there was brought against him a great deal of evidence by hearsay (*x*), the court at once admitted the objection, but evaded its force in a way that will be shown presently; and in Mich. T. 19 Jac. I., the principle that the opinions of witnesses are not a legitimate ground for legal decision, was recognised in the Star Chamber (*y*).

§ 113. Many other instances might be adduced, to show the recognition by our ancestors of principles of evidence which we are in the habit of looking on as altogether modern. Even the rules of our forensic practice respecting proof were known to them; as that at trials the party on whom the burden of proof lies ought to begin (*z*), that leading interrogatories ought not to be put (*a*), &c.

§ 114. But although the germs of our law of evidence are thus traceable in the proceedings of our ancestors, they do not appear to

(*o*) *Thomas's case*, Dyer, 99 b, pl. 68, P. 1 Mar.

(*p*) 3 Inst. 25.

(*q*) *Id.* 24.

(*r*) 1 H. P. C. 306; 2 *Id.* 287. These authorities probably did not mean that the evidence of the second witness was to be rejected as coming second-hand; but that, being traceable up to the first witness, it was a mere repetition of his testimony, and consequently could not be considered as the evidence of a second *accuser* within the meaning of the statute. See Hale, *in loc. cit.*, and 2 Hawk. P. C. c. 25, s. 141.

(*s*) *Samson* v. *Yardly*, 2 Keb. 223, (5) P. 19 Car. II.; *Luttrell* v. *Reynell*, 1 Mod. 282, and the authorities in the next three notes.

(*t*) 9 How. St. Tr. 608, 848, 1094; 12 *Id.* 1454.

(*u*) 4 *Id.* 431.

(*x*) 9 *Id.* 608.

(*y*) *Adams* v. *Canon*, reported in the margin of the edition of Dyer's Reports, 1688, 53 b, pl. 11.

(*z*) *Anon.*, Litt. R. 36; *Heidon* v. *Ibgrave*, 3 Leon. 162, pl. 211; Gouldsb. 23, pl. 2.

(*a*) 4 Inst. 279.

have reduced its principles into a system, or invested them with the obligatory force essential to the steady and impartial administration of justice. Except in the case of præsumptiones juris, which, being part of the law itself, it would have been manifestly improper to disregard, and in a few other instances, the principles of evidence were looked on as something merely directory, which judges and jurymen might follow or not at their discretion. The best illustration of this will be found in the practice relative to hearsay or second-hand evidence. We have seen that our ancient lawyers were perfectly aware of its weakness, but they did not think themselves called on to reject it absolutely. Thus in *Rolfe* v. *Hampden*, T. 34 Hen. VIII. (*b*), in order to support a will of land, contained in an ancient paper writing (before the Statute of Frauds), the testimony of three witnesses was received, one of whom spoke of his own knowledge, the rest on the report of others; and L. C. J. Dyer, by whom the case is reported, saw nothing extraordinary in this, but observes, "the jury paid little regard to the aforesaid testimony." And at a later period the courts seem to have thought that, although hearsay was not evidence in itself, it might be used to introduce, explain, or corroborate more regular proof (*c*).

§ 115. Instances are, however, to be found in the State Trials, previous to the revolution of 1688, of decisions going much beyond this, and the key to which lies in a circumstance commonly overlooked. So long as the judges believed that it was discretionary with them to enforce or disregard the received principles of evidence, it is natural to suppose that, with the high prerogative notions of those times, and dependent as they were on the crown, they would exercise that discretion in favour of the crown, and carefully avoid laying down any general rules which might fetter the executive in proceeding against state criminals. Accordingly we find that, in the sixteenth and early part of the seventeenth centuries, it was an open and avowed principle that the rules of evidence and practice in prosecutions for high treason, and perhaps for felony also, were different from those followed in ordinary cases (*d*). Thus, although by the established usage of the common law from the earliest times, witnesses were sworn, examined, and cross-examined in open court, the judges refused to compel their personal appearance in cases of treason (*e*), holding that it would be opening a gap for the destruction of the king (*f*), &c. The consequence of establishing this distinction

(*b*) Dyer, 53 b, pl. 11.

(*c*) 2 Hawk. P. C. c. 46, s. 14, Ed 1716, Bac. Abr. Evid. K., Ed. 1736; Trials per Pais, 389, 390; 1 Mod. 283.

(*d*) See 2 Hawk. P. C. c. 46, s. 9, and the authorities in the following notes.

(*e*) Staundf. P. C. 164.

(*f*) *Sir Walter Raleigh's case*, 2 How.

was, that on charges of that nature, not only was the loosest and most dangerous evidence received, but the entire proceedings were conducted in a way which set at defiance every principle of fairness and justice. "Throughout the state trials before the time of the Commonwealth," observes Mr. Phillipps (*g*), "the worst species of hearsay was constantly received; such as the examinations of persons who might have been produced as witnesses, or who had been convicted of capital offences, or who had signed confessions in the presence only of the officers of government, and under the torture of the rack." Thus, in the case of Sir Nicholas Throckmorton (*h*), the principal evidence was the deposition of a person already convicted of treason, and whose execution had been respited from time to time in order to induce him to accuse the prisoner (*i*). And among many flagrant misinterpretations of the law in favour of the crown and against the prisoner, of which that trial is full, the court unblushingly declared that the words in the Statute of Treasons, 25 Edw. 3, c. 2, stat. 5, that persons accused of treason should "thereof be provably attainted of open deed by people of their condition," meant that they should be attainted, not by verdict of a jury, but by the evidence of persons already attainted, who declare the accused participators in their treason, and are thus "people of their condition" (*k*). After the Restoration matters seem to have amended; the witnesses appeared in person, but the practice of admitting proof at second-hand continued, — the judges acknowledging that it was not evidence, and promising to tell the jury so (*l*). Thus, in *Langhorn's case*, 31 Car. II. (*m*), Atkins, J., interposed while a witness was giving his testimony. "That is no evidence against the prisoner, because it is by hearsay;" and Scroggs, C. J., added, "It is right, and the jury ought to take notice that what another man said is no evidence against the prisoner, for nothing will be evidence against him but what is of his own knowledge." Notwithstanding this language, to quote again from Mr. Phillipps (*n*): "On the trials for the Popish Plot, the evidence consisted principally of a narrative of the transactions of the supposed conspirators in various

St. Tr. 19. Hallam, in his Constitutional History of England, vol. 2, p. 148, 2nd Ed., speaking of the trial of the Earl of Strafford, says, that "in that age the rules of evidence, so scrupulously defined since, were either very imperfectly recognised, or continually transgressed."

(*g*) 1 Ph. Ev. 166, 10th Ed.

(*h*) 1 How. St. Tr. 869.

(*i*) 1 Ph. Ev. 166, 10th Ed.

(*k*) 1 How. St. Tr. 889.

(*l*) See *Langhorn's case*, 7 How. St. Tr. 441; *Lord William Russell's case*, 9 *Id.* 608; *Algernon Sidney's case*, *Id.* 848; *Charnock's case*, 12 *Id.* 1414 and 1454.

(*m*) 7 How. St. Tr. 441.

(*n*) 1 Ph. Ev. 166, 10th Ed. From the above observations it follows that too much reliance must not be placed on the valuable work called "The State Trials," as presenting a correct picture of the *ordinary* practice of English tribunals before the Revolution. It should not be forgotten that most of the cases there reported were prosecutions for high treason, and took place in times of great excitement.

countries, collected during a long period of time from a multitude of letters, the contents of which were given from recollection, — the witnesses not having taken a note of any part of the letters at the time of reading, not having read them for a great number of years, nor having been required in reading to notice their contents, and not producing one of the letters, or a copy, or even an extract."

§ 116. The system known in practice by the title of "The Law of Evidence," began to form about the middle of the seventeenth century, — at least this is sufficiently accurate for a general view. The characteristic feature which distinguishes it, both from our own ancient system and those of most other nations, is, that its rules of *evidence*, both primary and secondary, are in general rules of *law;* which are not to be enforced or relaxed at the discretion of judges, but are as binding on the court, juries, litigants, and witnesses as the rest of the common and statute law of the land, and that it is only in the forensic procedure which regulates the manner and order of offering, accepting, and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench. A judge, consequently, has now no more right to receive prohibited evidence, because he thinks that by so doing justice will be advanced in the particular case, than he has to suspend the operation of the Statute of Mortmain, or to refuse to permit an heir-at-law to recover in ejectment, because it appears that he is amply provided for without the land in dispute. It must not, however, be supposed that this great principle became established all at once; and indeed the gradual development of our system of judicial evidence, from the above epoch to the present day, may be studied alike with advantage and pleasure. To point out the various improvements and alterations that have from time to time been effected in it, by the courts and the legislature, would far exceed the limits of a mere sketch of its progress. It will therefore be sufficient to glance at a few particulars; and we shall proceed in the first place with the history, during that period, of the rule rejecting hearsay evidence.

§ 117. Although, as already stated, the infirmity of hearsay evidence was generally acknowledged in the reign of Charles II. (*o*), yet Sir Matthew Hale gave it as his opinion that where a rape was committed on a child of tender years, the court might receive, as evidence, the child's narrative of the transaction to her mother or other relations (*p*). At the beginning of the eighteenth century, Sergeant Hawkins only ventures to lay down the rule thus (*q*), "*it seems* agreed

(*o*) See *ante*, §§ 112, 115.
(*p*) 1 Hale, P. C. 634, 635.
(*q*) 2 Hawk. P. C. c. 46, s. 14, Ed. 1716.

that what a stranger has been heard to say is *in strictness* no manner of evidence either for or against a prisoner;" and similar language is used in Bacon's Abridgment (*r*). Lord Chief Baron Gilbert also, in his Treatise on the Law of Evidence, composed about the same time, being, it is believed, the earliest on the subject, lays down that "a mere hearsay is no evidence" (*s*); "but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself" (*t*). Still, in 1754, on the trial of Elizabeth Canning for perjury, we find some rather elaborately got up evidence tendered and rejected by the bench, the nature of which seems to show that the rule against hearsay was not then generally understood by the legal profession (*u*). Towards the end of the eighteenth century, however, the text-writers speak of the rule as established (*x*); but while recognised as obligatory, it was not extended to all the cases which fall within its principle. Thus, in 1779, on a trial for assault with intent to ravish a very young child, we find Buller, J. (himself the author of a treatise on Nisi Prius), adopting the course advised by Sir Matthew Hale about a century before, by receiving, as evidence, the information relative to the transaction which the child, who was not examined as a witness, had given to two other persons. The point having been reserved, this course was condemned by all the judges, and a definite rule relative to the testimony of children laid down for the future (*y*). Notwithstanding which, it is said that on the trial, in the year 1808, of an indictment for a rape on a child five years old, the same objectionable kind of evidence was again received; but, the question having been reserved, the judges, as might have been expected, thought the evidence clearly inadmissible (*z*). And an approved treatise of the present day informs us, that so late as the year 1790, there appears to have been no settled rule against the admission of hearsay evidence with regard to depositions taken before magistrates (whether upon criminal charges or upon other occasions); and several of the exceptions to this rule, which were formerly allowed, have been much narrowed within very modern times (*a*). The authors who have written on evidence during the current century, all speak of the rule rejecting hearsay evidence as established and notorious (*b*).

(*r*) Bac. Abr. Evid. (K.), Ed. 1736.
(*s*) Gilb. Ev. 149, 4th Ed.
(*t*) *Id.* 150.
(*u*) 19 How. St. Tr. 342, 343.
(*x*) Bull. N. P. 294; 2 Fonb. Eq. 450.
(*y*) *R.* v. *Brazier*, 1 Leach, C. L. 199.
(*z*) *R.* v. *Tucker*, MS.; cited Ph. & Am. Ev. 6, and 1 Ph. Ev. 10, 10th Ed.

(*a*) 1 Ph. Ev 165–66, 10th Ed. See *Higham* v. *Ridgway*, 10 East, 109, and the cases there referred to; *R.* v. *Eriswell*, 3 T R. 707; *R.* v *Chadderton*, 2 East, 27.

(*b*) 2 Ev Poth. 283, 284; and see any of the modern treatises.

§ 118. Other parts of the law of evidence are marked by similar improvement during the last and present centuries. The enlightened principle, that judicial oaths are not to be rejected on account of the witness holding erroneous notions on religion, provided a mode of swearing be found which he considers binding on his conscience, was fully established by the great case of *Omychund* v. *Barker* in 1745 (*c*). In later times also, relief has been given to particular classes of persons, who object on conscientious grounds to taking oaths in any shape (*d*). So the incompetency of witnesses on the ground of interest was extricated from the chaos of conflicting authority in which it lay involved, and placed on at least an intelligible footing, by the case of *Bent* v. *Baker* (*e*) in 1789, and other decisions of that period. In our own time this latter subject has attracted much attention,— the doctrine of the incompetency of witnesses having been attacked in toto as improper and mischievous (*f*), and being now almost annihilated (*g*). By various recent statutes, also, many species of documents have been invested with the character of public documents, and made evidence against all persons, of the facts which they record or attest (*h*); the proof of public documents in general has been rendered more simple and less expensive (*i*); proof of certain things, which it may fairly be deemed needless to prove, has been dispensed with (*k*); liberal powers of amending variances at trials have been vested in tribunals (*l*); and more effective means have been afforded to litigants, of getting at evidence in the custody or under the control of the opposite party (*m*). And, by "The Common Law Procedure Act, 1854" (*n*), various anomalies have been removed from the forensic procedure affecting our law of evidence, and the system itself brought more into harmony with its own principles. The value of this statute was much impaired by its operation being confined to the evidence given in civil cases (*o*), but this was remedied by the 24 & 25 Vict. c. 66, the 28 Vict. c. 18, and the 32 & 33 Vict. c. 68.

While these alterations must on the whole be viewed as improve-

(*c*) 1 Atk. 21; Willes, 538; 1 Wils. 84.

(*d*) *Infrà*, bk. 2, pt. 1, ch. 2.

(*e*) 3 T. R. 27. See Ph. & Am. Ev. 74, 75.

(*f*) Benth. Jud. Ev. vol. 1, 1–15; vol. 5, 1–191, &c., &c.; Tayl. Ev. §§ 1210 *et seq.*, 4th Ed. See this subject considered *infrà*, bk. 2, pt. 1, ch. 2.

(*g*) *Infrà*, bk. 2, pt. 1, ch. 2.

(*h*) 8 & 9 Vict. c. 16; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 67, &c.

(*i*) 8 & 9 Vict. c. 113; 14 & 15 Vict. cc. 99 and 100; 17 & 18 Vict. c. 104, ss. 107, 138, 175, N. 3, 249, 277; 18 & 19 Vict. c. 91, s. 15; 20 & 21 Vict. c. 77, s. 91; 31 & 32 Vict. cc. 37 & 54; 36 & 37 Vict. c. 33.

(*k*) 8 & 9 Vict. c. 113; 11 & 12 Vict. c. 42, s. 17; 14 & 15 Vict. c. 99; 17 & 18 Vict. c. 104, s. 270, &c.

(*l*) *Infrà*, bk. 3, pt. 1, ch. 3.

(*m*) 14 & 15 Vict. c. 99, s. 6; 17 & 18 Vict. c. 125, ss. 50, 51 *et seq.* Rules of the Supreme Court, Order XXXI.

(*n*) 17 & 18 Vict. c. 125, ss. 22–27.

(*o*) Sect. 103.

ments, it may be a question whether they have not, in some cases, been carried too far. The principle which attaches so much faith to public documents, for instance, rests in a great degree on the rule, "Omnia præsumuntur ritè esse acta," — a maxim unquestionably just when restrained within its due limits, but which loses much of its force when the document is only of a *quasi* public nature; *i. e.*, drawn up by individuals acting in some sense indeed on the part of the public, but having a personal interest in the existence of the facts they profess to record or attest. And there is another maxim equally valuable which must not be lost sight of, — "Res inter alios acta alteri nocere non debet." In one instance at least — that relating to entries in the official log-books of merchant ships — the legislature found it necessary to retrace its steps in this respect (*p*); and several cases illustrate the danger of the enactments in the 8 & 9 Vict. c. 16, s. 28, and 25 & 26 Vict. c. 89, s. 37, which, in an action by a railway company for calls, render the register of shareholders primâ facie evidence of the defendant being a shareholder, and of the number and amount of his shares (*q*).

The history of affidavit evidence in equity causes is not a little curious. Following the practice of the civil law, the Court of Chancery for many centuries decided causes upon affidavit evidence, with occasional oral cross-examination. In 1852, however, Parliament interfered, and by 15 & 16 Vict. c. 86, ss. 28–30, directed that evidence should be taken orally at the request of either party. In 1855, a General Order (*r*) was issued, which had the effect of rendering these enactments in a great measure inoperative. In 1859, the Chancery Evidence Commissioners reported that it was desirable that facilities should be afforded for the trial of material facts contested between the parties upon vivâ voce evidence. In 1860, the Equity Judges were empowered, by 23 & 24 Vict. c. 128, to make rules for carrying the recommendations of this report into effect. The result was a second General Order (*s*), which left the mode of taking evidence to the discretion of the judge. And so the practice

(*p*) See the 13 & 14 Vict. c. 93, ss. 85–93, and the alterations introduced by the amending Act, 14 & 15 Vict. c. 96, s. 27. Both these statutes are repealed by the 17 & 18 Vict. c. 120; and by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 244 and 285, the provisions in the 14 & 15 Vict. c. 96, s. 27, as to the admissibility in evidence of the official log-books of merchant vessels, have been re-enacted with still further improvements.

(*q*) *Waterford Railway Company* v. *Pidcock*, 8 Exch. 279; *Nixon* v. *Brownlow*, 3 H. & N. 686. In *Darby* v. *Ouseley*, 2 Jur. N. S. 497, 499, Pollock, C. B., said that there were many instances of the names of persons having been inserted, without their knowledge, in the books of railway companies.

(*r*) Order IV. of 13th January, 1855; Order XIX. Rule 3 of Chancery Consolidated Orders, 1861. The Order began, "It shall not be competent for the plaintiff or any defendant to require, by notice or otherwise, that the evidence to be adduced shall be taken orally."

(*s*) Order of 5th February, 1861, Rule 3.

remained until the Court of Chancery was merged in the High Court of Justice by the Judicature Acts; and the present Rules of the Supreme Court (*t*) provide that generally, in the absence of any agreement in writing between the solicitors of all parties, the witnesses at the trial of any action should be examined vivâ voce and in open court. In theory, therefore, vivâ voce evidence is the rule in the Chancery as well as in the other divisions of the High Court, but it is believed that the agreement for affidavit evidence is in practice so frequently made that vivâ voce evidence is still the exception and not the rule.

§ 119. The slow development of the law of evidence, compared with that of the other branches of our jurisprudence, seems a natural consequence of the general principle that in every nation the substantive rules of law arrive at maturity before the adjective. The reason is obvious. Rules defining the rights of persons and property, or creating offences and assigning their punishment, are almost coeval with the existence of civil society; while the procedure, or mode of enforcing rights and carrying the sanctions of penal law into effect, are usually left for a long time, and to a certain extent ever must be left, to the discretion of the persons intrusted with the administration of justice. But our modern system of evidence probably owes its establishment to the following *secondary* causes: 1. The independence of the judges on the crown, begun by the 12 & 13 Will. 3, c. 2, s. 3, and completed by the 1 Geo. 3, c. 23, which naturally had a considerable effect in preventing artificial distinctions being made, between the proofs in state prosecutions and in other cases. 2. The allowing to persons accused of treason or felony the right of being defended by counsel (*u*); the necessary consequence of which was that objections to the admissibility of evidence were much more frequently taken, the attention of the judges was more directed to the subject of evidence, their judgments were better considered, and their decisions more fully reported, and better remembered. 3. And principally, the gradual change effected in the constitution of the common-law tribunal for the trial of matters of fact. As Serjeant Stephen observes, "it is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were

(*t*) Order XXXVII. Rule 1. Where consent to use affidavits appeared to be improperly withheld, Bacon, V.-C., ordered the party withholding consent to pay the costs of an unsuccessful application by the other party for leave to use them. *Patterson* v. *Woller*, 2 Ch D. 586.

(*u*) In treason, by 7 & 8 Will. 3, c. 3, s. 1; and 20 Geo. 2, c. 30. Although persons accused of felony were not allowed to make their full defence by counsel until the 6 & 7 Will. 4, c. 114, yet for a long time before that statute, counsel were allowed to take and to argue legal objections for them, and even by connivance to examine and cross-examine witnesses. See bk. 4, pt. 1.

witnesses to the facts, or at least in some measure *personally cognisant* of them; and who, consequently, in their verdict gave, not (as now) the conclusion of their judgment upon facts proved before them in the cause — but their testimony as to facts which they had antecedently known" (*v*). This circumstance, which is a key to so many of the common-law rules of pleading, will throw considerable light on our system of judicial evidence. That the jury were witnesses of a particular kind, at least as late as the reign of Edw. I., and that they had ceased to be such in that of Charles II., perhaps much sooner, is indisputable. But in the mean time the system was in a sort of transition state (*x*); and it was not until the final determination of that state that the rules of evidence, which depend so much on the functions of the component parts of the judicial tribunal being clearly defined, could assume a permanent and consistent form. Other causes may have contributed, and indeed the above are only offered in the way of speculation.

§ 120. But whatever the age or origin of our system of judicial evidence, it is on the whole a noble one, and may fearlessly challenge comparison with all others. Its principal features stand out in strong and fine relief, whilst its leading rules are based on the most indisputable principles of truth and common sense. It must not, however, even with all the improvements of modern legislation, be supposed perfect; on the contrary, it still has defects which its well-wishers behold with regret. The application of its great rules having occa-

(*v*) Steph. Plead. 145, 5th Ed. See also *Id.* 480, and Append. note 33. To his authorities, which are indeed conclusive enough on this matter, we add the following. It was agreed by the court in *Rolfe* v. *Hampden*, T. 34 Hen. VIII. Dyer, 53 b, pl. 11, that the plaintiff in attaint could not give more evidence nor call more witnesses than he had given to the petit jury, but è contra the defendant might give more in affirmance of the first verdict. The functions of jurors and the distinction between them and other witnesses is strikingly pointed out in 23 Ass. pl. 11. It was proposed to challenge a witness to a deed because he was cousin to the plaintiff. "Et non allocatur, for the witnesses are not challengeable, because the verdict shall not be received from them, but from those of the assize, and the witnesses were sworn simply to say the truth, without saying to their know ledge (a lour estient), for they ought to testify nothing but what they *see* and *hear*." The same was held in the 12 Ass. pl. 11 & 41, in the former of which we are told, "The assize (the jury) came and were charged to say the truth of their knowledge (a lour science), and the witnesses without their knowledge (sans lour scient), to say the truth and loyally inform the inquest." See also 11 Ass. pl. 19.

(*x*) The authorities in the last note show how this stood in the time of our early Plantagenet monarchs; the celebrated judgment of Vaughan, C. J., in *Bushell's case*, Vaugh. 135, fixes the practice in the latter part of the seventeenth century, nearly as it exists at the present day. The difficulty is to trace its progress in the intervening period. Fortescue, De Laud. Leg. Ang. cc. 26, 32, towards the close of the fifteenth century, considers the jury in the light of witnesses. Vavisor, J., a little later, in the 14 Hen VII. 29 b, pl. 4, 2 Rol. Ab. 677, pl. 27; and Brooke, Recorder of London, *arguendo*, in the middle of the next century, *Renuger* v. *Fogassa*, Plowd. 12, H. 4 Edw. VI, state it as clear that a jury may find their verdict without any evidence laid before them.

sionally fallen to the lot of unskilful or careless hands, the general outline has been in some places badly filled up, lines cross that ought to bound the domain of principles just in themselves, and the extension of which to cases where they are inapplicable has frequently been productive of injustice, and has exposed the whole system to censure. Add to this, that the comparatively modern growth of the system has rendered it impossible to get rid at once either of all the erroneous principles, or of the many strait-laced applications of sound ones, which were established by our ancestors for themselves, or borrowed from the civilians of the middle ages.

§ 121. But besides these imperfections, which perhaps may be looked on as adventitious, our system has faults of a more positive kind. Thus, sufficient attention was not paid by its founders to *official pre-appointed evidence*. And although some steps have been taken in this direction, — *e. g.*, by the 6 & 7 Will. 4, c. 86, and subsequent statutes for the registration of births, marriages, and deaths; by the 1 & 2 Vict. c. 110, s. 9, and the 32 & 33 Vict. c. 62, s. 24, requiring professional attestation to cognovits and warrants of attorney to confess judgment; by various clauses of the Merchant Shipping Act, 17 & 18 Vict. c. 104 (*y*); and by the 20 & 21 Vict. c. 77, s. 91, establishing depositories for the wills of living persons, &c., — there is still room for improvement; and the principles adopted in the laws of some foreign countries on this subject might, under due restrictions and with the required caution, be advantageously introduced here. Another defect of our system is the want of some cheap and expeditious means of perpetuating testimony. "Id observandum, aliquando hodie probationem suscipi ante litem contestatam, si reus prævideat, se conventum iri, et periculum sit, ne testes, quibus exceptionem suam judici probare queat, moriantur, vel alio migrent, vel si actor metuat, ne sibi testimonium propter testium morbum, vel absentiam pereat. Id quod doctores vocant probationem *in perpetuam rei memoriam*" (*z*). With the exception of the writs of "warrantia chartæ" (*a*), "curiâ claudendâ" (*b*) (both abolished by the 3 & 4 Will. 4, c. 27, s. 36), and a few other instances, the common law did not allow legal proceedings on the mere suspicion of *intended* wrong or breach of duty; and it was probably in furtherance of this principle that it provided no general mode of perpetuating testimony, for which purpose it was necessary to have recourse to a bill in equity (*c*). But that process was circuitous, expensive, and frequently inadequate; the result of which, doubtless, was that much valuable

(*y*) Sects. 107, 138, 175, n. 3, &c.
(*z*) Heinec. ad Pand., pars 4, § 125.
(*a*) F. N. B. 134 K. 8th Ed.
(*b*) F. N. B. 127 I, in marg. 8th Ed.
(*c*) 3 Blackst. Comm. 450; Com. Dig. Chancery R.; 2 Phill. Ev. 453, 10th Ed.

evidence was daily carried to the grave. It is, however, much easier to detect the disease than to point out the fitting remedy; and the difficulty of this subject has been felt by the lawgivers of other countries as well as our own (*d*). Steps in advance, however, were taken by the 5 & 6 Vict. c. 69 (*e*), and 30 & 31 Vict. c. 35, s. 6 (*f*); by the Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 448, 449, relative to taking the examination of persons belonging to ships in distress; and by the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), which enables persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and to prove their own right to be deemed natural-born subjects. And, by the present "Rules of the Supreme Court" (*g*), "the court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath, before the court or judge, or any officer of the court, or any other person, and at any place, of any witness or person; and may empower any party to any action or other proceeding, to give such deposition in evidence therein, on such terms, if any, as the court or a judge may direct."

By sect. 20 of the Judicature Act, 1875, neither the Judicature Acts nor any of the Rules of the Supreme Court, "save as far as relates to the powers of the court for special reasons to allow depositions or affidavits to be read, affect the mode of giving evidence by the oral examination of witnesses in trials by jury or the rules of evidence." But, as we have seen, Order XXXVII. contains some important modifications of the practice as to affidavit evidence in equity causes, by directing that evidence at a trial shall be oral, unless the parties agree that it shall be on affidavits, and that affidavits, if used, "shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted; while Order XXXVI., Rule 38, provides that "the judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in a cause or matter."

§ 122. The statutes containing incidental enactments as to evidence are very numerous. Mr. Taylor, in the 6th edition (published

(*d*) See Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3.

(*e*) The object of which was, to extend the means of perpetuating testimony in suits touching honours, titles, &c., or estates or interests in property, real or personal, the right or claim to which could not be brought to trial before the happening of some future event.

(*f*) Passed to extend the means of perpetuating testimony in criminal cases.

(*g*) Order XXXVII. r. 5.

in 1878) of his valuable and exhaustive work on evidence, cites more than 750. On the other hand, the statutes dealing with evidence generally, or concerned with evidence alone, are comparatively very few in number, as appears from the following table (*h*): —

5 Eliz. c. 9. — Punishment of perjury. — Penalty on person summoned to give evidence and failing to attend.

19 Car. 2, c. 6. — Persons for whose lives leases have been granted who absent themselves for seven years, and who cannot be proved to be alive, are to be presumed to be dead.

29 Car. 2, c. 3 (Statute of Frauds). — Leases for three years or more, assignments, surrenders (*i*), promises of executor to be personally liable, guarantees, agreements upon consideration of marriage, contracts for sale of land, agreements not to be performed within a year, and contracts (in the absence of acceptance or part payment) for sale of goods for ten pounds or more, required to be in writing signed by the party to be charged.

6 Ann. c. 18. — Where infant or married tenant for life is believed to be dead, and the death believed to be fraudulently concealed, the remainderman may obtain an order for their being produced to some person named therein; failing production of which tenants for life, remainderman may enter into possession.

2 Geo. 2, c. 25, s. 2. — Punishment of perjury (*j*).

5 Geo. 2, c. 7. — Proof of debts in American colonies by affidavit sworn before magistrate in Great Britain.

13 Geo. 3, c. 63. — Examination of witnesses in India on commission.

46 Geo. 3, c. 37. — Witness may not refuse to answer on the ground of submitting himself to suit for debt for damages.

51 Geo. 3, c. 15. — Proof of debts in New South Wales by affidavit sworn before magistrate in Great Britain.

1 Will. 4, c. 22. — Examination of witnesses abroad upon commission.

1 & 2 Vict. c. 105. — Persons bound by oath administered in any form which they consider binding.

5 & 6 Vict. c. 69. — Power to persons claiming property contingent on future events to file bill to perpetuate any

(*h*) This table is partly taken from that prefixed to the statutes collected under tit. "Evidence" in Chitty's Statutes, 4th Ed. vol. 2, p. 794.

(*i*) By virtue of this Act, and 8 & 9 Vict. c. 106, s. 3, these leases, and also assignments, and also surrenders of a more than three years' term, are "void at law, unless made by *deed*."

(*j*) By virtue of this Act, and 20 & 21 Vict. c. 3, perjury is punishable by seven years' penal servitude.

testimony which may be material for establishing such claims.

6 & 7 Vict. c. 85. — Abolition of the rule excluding witnesses from giving evidence by reason of incapacity from crime or interest (with proviso excepting parties to the record).

8 & 9 Vict. c. 113. — Official documents receivable in evidence without proof of seal or signature. — Courts to take judicial notice of signature of judges. — Local and personal act provable by Queen's Printers' Copy.

14 & 15 Vict. c. 99. — Parties in civil proceedings competent and compellable to give evidence. — Foreign and colonial acts of state and judgments provable by certified copies. — Conviction or acquittal provable by certificate. — Admissibility of examined or certified copies of public documents generally. —Every court which may hear evidence may also administer an oath.

16 & 17 Vict. c. 83. — Husbands and wives of parties in civil proceedings competent and compellable to give evidence. — Neither husband nor wife competent or compellable to disclose communication made during marriage.

17 & 18 Vict. c. 34. — Courts in England, Ireland, and Scotland may issue process to compel the attendance of witnesses out of their jurisdiction.

17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854, s 20). — Witness in civil proceedings refusing from conscientious motives to be sworn may affirm. — Repealed and replaced by Oaths Act, 1888, *infrà*.

Sects. 23–27. — Party may discredit his own witness. — Proof may be given that witness has made statements inconsistent with his present testimony. — Witness may be cross-examined as to previous statements in writing. — Proof of conviction of witness for crime may be given. — Attesting witness need not be called unless attestation required by law. — Disputed writing may be compared with writing proved to be genuine.

19 & 20 Vict. c. 113. — Power for British court, upon certificate of foreign minister, to order the examination, in this country, of witnesses in relation to civil matters pending before foreign tribunals.

22 Vict. c. 20. — Power for British and colonial courts to order the examination, within their jurisdiction, of witnesses in suits out of their jurisdiction.

22 & 23 Vict. c. 63. — Ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part.

24 Vict. c. 11 (Foreign Law Ascertainment Act, 1861). — This Act, which empowers British courts to obtain, by transmission of a case, the opinion of foreign courts upon points of foreign law, and correspondingly empowers foreign courts to obtain the opinion of British courts upon points of British law, does not come into force until a *convention* has been entered into between British and foreign governments; and as no such convention has yet been entered into, the Act has as yet proved wholly abortive (*j'*).

24 & 25 Vict. c. 66. — Witness in criminal proceedings refusing from conscientious motives to be sworn may affirm. *Repealed and replaced* by Oaths Act, 1888, *infrà*.

28 Vict. c. 18. — Assimilation of law of evidence in criminal to law in civil proceedings as laid down by ss. 22–27 of the Common Law Procedure Act, 1854, *suprà*.

31 & 32 Vict. c. 37 (Documentary Evidence Act, 1868). — Proof of Order in Council or of public offices by copy of London "Gazette," or Queen's Printers' copy of Order, or by certified copy.

32 & 33 Vict. c. 68 (Evidence Further Amendment Act, 1869). — Parties in action for breach of promise of marriage may give evidence, but must be corroborated. — Parties to any proceedings instituted in consequence of adultery may give evidence. — Persons objecting to take an oath in any "court," or objected to as incompetent to take an oath, may make declaration. *The last part is repealed and replaced* by the Oaths Act, 1888, *infrà*.

33 & 34 Vict. c. 49 (Evidence Amendment Act, 1870). — The word "court" in the Act of 1869 extended to any person having authority to administer an oath. *Repealed and replaced* by Oaths Act, 1888, *infrà*.

40 & 41 Vict. c. 14. — Defendant and husband and wife of defendant competent and compellable to give evidence on the trial of any indictment instituted for the purpose of trying a civil right only.

42 Vict. c. 11 (Bankers' Books Evidence Act, 1879). — Examined copy of entry in bankers' books to be received as primâ facie evidence of such entry.

45 Vict. c. 9 (Documentary Evidence Act, 1882). — Proof of public documents by copy purporting to be printed under superintendence of the Stationery Office.

51 & 52 Vict. c. 46 (Oaths Act, 1888). — Persons objecting

(*j'*) See Chit. Stat. vol. iii. p. 827, n. (*a*), tit. *Evidence*.

to take oath either because they have no religious belief, or that taking an oath is contrary to their religious belief, permitted to affirm.

This is believed to be a complete list of the statutes dealing with evidence generally, or concerned with evidence alone. They show very conspicuously the national habit of proceeding by gradual, in preference to sudden reforms of the law.

BOOK II.

INSTRUMENTS OF EVIDENCE.

§ 123. By "Instruments of Evidence" are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal (*a*). The word "instrument" has, however, both with ourselves and the civilians, a secondary sense; *i. e.*, denoting a particular kind of document (*b*). These instruments of evidence are of three kinds: —

1. "Witnesses," — persons who inform the tribunal respecting facts.
2. "Real Evidence," — evidence from things.
3. "Documents," — evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.

Although, in natural order, the subject of real evidence precedes that of witnesses, it will be more convenient to treat of the latter first, as it is by means of witnesses that both real and documentary evidence are usually presented to the tribunal.

(*a*) "Instrumentorum nomine ea omnia accipienda sunt, quibus causa instrui potest: et ideo tam testimonia, quam personæ instrumentorum loco habentur:" Dig. lib. 22, tit. 4, l. 1.

(*b*) See *infrà*, pt. 3, and Heinec. ad Pand. pars 4, § 126.

AMERICAN NOTES.

(§ 123) The Media of Evidence. — Aside from real evidence, of which the court or jury are the original percipient witnesses (§ 196, n. 1, *infra*), and evidence of matters of which judicial cognizance is taken (§ 253, n. 1, *infra*), all evidence comes to the tribunal either (*a*) as the statement of a witness, or (*b*) as the statement of a document.

(*a*) It is not necessary that the statement of a witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand, may, in the discretion of the court, be employed. Thus, a deaf mute may testify by signs, by writing, or through an interpreter. State *v.* DeWolf, 8 Conn. 93; Com. *v.* Hill, 14 Mass. 207; Snyder *v.* Nations, 5 Blackf. 295; Skaggs *v.* State, 108 Ind. 53; Quinn *v.* Halbert, 55 Vt. 224; People *v.* McGee, 1 Denio, 19. For an interesting instance, where a dying woman, conscious, but without power of articulation, on being asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence, see Com. *v.* Casey, 11 Cush. 417.

Models, Maps, &c. The witness is entitled to aid or illustrate evidence, by such explanations through maps, diagrams, &c. as may, in the opinion of the court, assist the jury. Burwell *v.* Sneed, 104 N. C. 118; Griffith *v.* Rife, 72 Tex. 185. So the model of a horse's mouth is admissible. Earl *v.* Lefler, 46 Hun, 9. So official plan of layout is admissible. Badgel *v.* Bender, 3 U. C. Jur. o. s. 221. So of plan of locality of crime. Moon *v.* State, 68 Ga. 687. Experiments may take place in or out of court. Sullivan *v.* Com., 93 Pa. St. 284; Dillard *v.* State, 58 Miss. 368; Berney *v.* Dinsmore, 141 Mass. 42; but see State *v.* Sanders, 68 Mo. 202; State *v.* Smith, 49 Conn. 376. Photographs are admissible. R. R. *v.* Smith, 90 Ala. 25; Bliss *v.* Johnson, 76 Cal. 597; Dyson *v.* R. R., 57 Conn. 9; Franklin *v.* State, 69 Ga. 36; Keyes *v.* State, 122 Ind. 527; Eborn *v.* Zimpelman, 47 Tex 503; People *v.* Smith, 121 N. Y. 578; Blair *v.* Pelham, 118 Mass. 420; Cozzens *v.* Higgins, 33 How. Pr. 436; People *v.* Fish, 125 N. Y. 136; Church *v.* Milwaukee, 31 Wis. 512; Locke *v.* R. R. Co., 46 Ia. 109. See also Brown *v.* Ins. Co., 65 Mich. 306; Tome *v.* R. R., 39 Md. 36; Foster's Will, 34 Mich. 21.

(*b*) For some consideration of the rules regulating documentary evidence, see § 215, n. 1, *infra.*

PART I.

WITNESSES.

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§ 124. A WITNESS may be defined, a person who gives evidence to a judicial tribunal (*a*). The term is also sometimes used in the sense of testimony, as when a witness is said to be "an evidence" for or against a party. This form of speech is, however, passing away, and is rarely used except when a criminal is admitted to bear testimony against his accomplices, who is then said to turn "Queen's evidence." In dealing with this subject, we propose to consider,—

1. What persons are compellable to give evidence.
2. The incompetency of witnesses; or who are disqualified from giving evidence.
3. The grounds of suspicion of testimony.

(*a*) The word "witness" is of Saxon origin, being derived from "weten," to know; and we still have the phrase "to wit."

CHAPTER I.

WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

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§ 125. The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person, therefore, who, without just cause, absents himself from a trial at which he has been duly summoned to attend as a witness; or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, — is liable to punishment for contempt (*a*). An exception exists in the case of The Sovereign, against whom, of course, no compulsory process of any kind can be used (*b*).[1]

(*a*) The following case has been put in illustration of the universality of this rule: "Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor to be passing in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper and the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No! most certainly not."— Bentham's Draft of a Code for the Organisation of the Judicial Establishment in France, A. D. 1790, chap. 1, tit. 1. "We remember," says a writer in a legal periodical, "a prosecution for blasphemy, in which the defendant, by way of showing the divided state of opinion on theological subjects, actually subpœnaed the heads of all the religious persuasions he could hear of, and when the day of trial arrived, these found themselves all shuffled up together in the waiting-room, — the Archbishop of Canterbury and the High Priest of the Jews being of the party."— Law Mag. vol. 25, p. 364. When the Emperor Napoléon the First was on board the "Bellerophon" in the English waters, an attempt was made to detain him in this country by means of a subpœna to give evidence on a trial, but which it was found impossible to serve. Scott's Life of Napoléon, vol. 9, p. 96.

(*b*) See *infrà*, ch. 2.

[1] The ambassador of a foreign state, as representing his sovereign, cannot be compelled to testify, — the privilege being that of his government, and not personal to the ambassador. Dana's Wheaton, notes 125, 129. Whether, in America, the Supreme Executive, President or Governor, has the exemption from compulsory process accorded the sovereign in England, is in dispute. Probably not; if the privilege in fact exists, it is based on entirely different reasons. 1 Burr's Trial, Hopkins & Earle's Ed., pp. 114, 127, 131, 180, 186, 249, 254; 2 Ib. 535, 536; Thompson *v.* German Valley R. R. Co., 22 N. J. Eq. 111. The process of subpœna issues, it would seem, as a matter of course, against the Supreme Executive as against a private individual. But it by no means follows that a court

§ 126. No action lies against a witness in respect of his evidence. He is absolutely privileged as to anything he may as a witness do in reference to the cause (*c*).[1] Various matters which are privileged from disclosure on general grounds of public policy will be considered in another part of this work (*d*).[2] But besides these, the law extends a *personal* privilege to witnesses, of declining to answer particular questions, — a privilege based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them as far as possible from injury or needless annoyance in consequence of so doing. It is therefore a settled rule that a witness is not to be compelled to answer any question, the answering which has a tendency to expose him to a criminal prosecution, or to proceedings for a penalty, or for a forfeiture even of an estate or interest. "Nemo tenetur seipsum accusare" (*e*). "Nemo tenetur seipsum prodere" (*f*). This is laid down in all our books (*g*), is the established practice of the courts, and is recognised by the stat. 46 Geo. 3, c. 37 (*h*), 26 & 27 Vict. c. 29, s. 7, &c. By 1 Will. 4, c. 22, s. 5, and 6 & 7 Vict. c. 82, s. 7, no witness examined under a commission shall be compelled to produce any writing or other document that he would not be compellable to produce at a trial, &c.; and the 14 & 15 Vict. c. 99, which (sect. 2) renders the parties to a cause competent and compellable to give evidence according to the practice of the court, expressly provides (sect. 3) that nothing therein contained "shall render any person compellable to answer any question tending to criminate himself" (*i*). The 19 & 20 Vict. c. 113, s. 5, — for taking evidence here

(*c*) *Seaman* v. *Netherclift*, 2 C. P. D. 53 (C. A.).

(*d*) Bk. 3, pt. 2, ch. 8.

(*e*) Hard. 139; Wing. Max. 486; Lofft, Max. 361; 10 Exch. 88; 3 H. & N. 363.

(*f*) 3 Bulst. 50; 4 Blackst. Comm. 296; 3 Mac. & G. 212; 10 Exch. 93; 2 Den. C. C. 434.

(*g*) Ph. & Am. Ev. 913, 914, 916; Tayl. Ev. § 1308; Stark. Ev. 204, 4th Ed.

(*h*) See that statute, *supra*, p. 105.

(*i*) The peculiar language of this section has given rise to the question whether, when a party to a suit is examined as a witness, his privilege in not answering questions is not more limited than that of other witnesses, and is confined to the case where the answer would tend to *criminate* him. Tayl. Ev. § 1217; *May* v. *Hawkins*, 11 Exch. 210; 1 Jur. N. S. 600.

enforces its summons by the process of contempt. Practical considerations and respect for a co-ordinate branch of the government will undoubtedly induce judicial tribunals to regard official engagements and duties as a sufficient excuse for non-attendance. Thompson *v.* German Valley R. R. Co., 22 N. J. Eq. 111; Appeal of Hartranft *et al.*, 85 Pa. St. 433.

[1] It has, however, been held in the United States that the statement of a witness is only conditionally privileged. The statement must be without malice, and in supposed discharge of a witness's duty. 1 Whar. Ev. § 497; White *v.* Carroll, 42 N. Y. 161; Shadden *v.* McElwee, 86 Tenn. 146. The privilege extends even to witnesses before legislative committees. Wright *v.* Lothrop, 149 Mass. 385. As to the additional protection given by the rule which requires corroborative evidence to sustain a charge of perjury, see § 596, n. 1 (*b*), *infra*.

[2] See § 578, n. 1, *infra*.

in relation to certain matters pending before foreign tribunals, — enacts that every person examined under it "shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause, &c. would be entitled to;" and a similar provision is contained in the 22 Vict. c. 20, s. 4, — for taking evidence in proceedings pending before tribunals in the Queen's dominions, in places out of their jurisdictions, — with reference to persons examined under that Act. And lastly, it is provided, by the 32 & 33 Vict. c. 68, s. 3, that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question, tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*k*).

Husbands and wives do not seem to be bound to answer questions tending to criminate each other; but the authorities are somewhat conflicting (*l*).

§ 127. In order to entitle a witness to refuse to answer a question, on the ground that it might tend to criminate him, the question need not be such that the answer thereto would *itself be evidence against him* on a criminal charge; it is sufficient if the answer might furnish a link in a chain of evidence which might implicate him in such a charge (*m*). In one case, indeed (*n*), Pollock, C. B., went farther, laying it down, incidentally, — for it was unnecessary to the decision of the point before the court, — that it did not at all follow that the witness who is privileged from answering must be guilty of an offence; that a man may be placed in such circumstances connected with the commission of a crime that if he disclose them he would be fixed on by his hearers as the guilty person, and he might not be able to explain those circumstances, so that the rule is not always the shield of guilt, — it may be the protection to innocence. In the absence of more distinct authority, it is not easy to say whether this notion is well founded. Possibly such cases may fall within one or both of the principles, "Nemo tenetur seipsum *accusare*" (*o*), "Nemo tenetur se infortuniis et periculis exponere" (*p*); in furtherance of the

(*k*) The legislature has also recognised the principle on several other occasions, either by depriving particular witnesses of the privilege, or by an act of indemnity rendering it valueless to them. Tayl. Ev. § 1310, where various instances are collected.

(*l*) See *R.* v. *The Inhabitants of Cliviger*, 2 T. R. 263; *R.* v. *The Inhabitants of All Saints, Worcester*, 6 M. & S. 194, 200, per Bayley, J.; *Cartwright* v. *Green*, 8 Ves. 405, 410; *R.* v. *Halliday*, Bell, 257.

(*m*) Per Blackburn, J., *Reg.* v. *Hulme*, L. Rep., 5 Q. B. 377, 384. And see *Fisher* v. *Ronalds*, 12 C. B. 765, per Maule, J.; *Osborn* v. *The London Dock Company*, 10 Exch. 701, per Alderson, B.; *Paxton* v. *Douglas*, 19 Ves. 226, 227; *Short* v. *Mercier*, 3 Mac. & G. 218.

(*n*) *Adams* v. *Lloyd*, 4 Jur. N. S. 593; *S. C.*, 3 H. & N. 363.

(*o*) *Supra*, § 126.

(*p*) Co. Litt. 253 b.

latter of which principles, a party under the necessity of making continual claim to lands was not bound to approach them more closely than was consistent with his personal safety (*q*).

§ 128. When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency (*r*).[1] But much difference of opinion has been expressed, as to whether, if a witness or party interrogated objects to answering a particular question, alleging on oath that the answer would tend to expose him to criminal proceedings, penalty, or forfeiture, the court is bound to disallow the question, even though it does not see in what possible way the answer to it could have that effect. This question arose in *R.* v. *Garbett* (*s*) on a case reserved, which was, however, ultimately decided on another point. In *Fisher* v. *Ronalds* (*t*), Jervis, C. J., and Maule, J., laid down in the most unequivocal terms that the court is bound by the statement on oath of the witness; and their language was cited with approbation in *Adams* v. *Lloyd* (*u*) by Pollock, C. B., but with this qualification, that the judge must be perfectly certain that the witness is not trifling with the authority of the court, and availing himself of the rule of law, in order to keep back the truth, having in reality no ground whatever for claiming the privilege. The whole doctrine was, however, distinctly denied by Parke, B., in *Osborn* v. *The London Dock Company* (*x*), and by Stuart, V.-C., in *Sidebottom* v. *Adkins* (*y*), the latter of which is an express decision on the subject, the others being only dicta unnecessary for the determination of the cases in which they are found. It was also gravely doubted by Willes, J., in *Ex parte Fernandez* (*z*). In support of the exclusive right of the witness or party interrogated, it was urged that, as he alone can know in what way the answer to any particular question could affect him, the requiring him to explain this to the court would be a virtual denial of the privilege; seeing that it is impossible to affirm à priori, that any imaginable fact can under no possible circumstances whatever become evidentiary, either immediately or mediately of any other. That as, when a witness called on to produce documents under a subpœna duces tecum swears that they are his muniments of title,

(*q*) Litt. sect. 419 *et seq.*

(*r*) In *Re The Mexican and South American Company, Ex parte Aston*, 27 Beav. 474, affirmed on appeal, 4 De Gex & J. 320; *Ex parte Fernandez*, 10 C. B. N. S. 3, 40, per Willes, J.

(*s*) 1 Den. C. C. 236; 2 Car. & K. 474.

(*t*) 12 C. B. 762; 22 L. J. N. S., C. P. 62; 17 Jur. 393.

(*u*) 3 H. & N. 361, 362; 27 L. J. N. S., Exch. 499; 4 Jur. N. S. 590.

(*x*) 10 Exch. 702; 1 Jur. N. S. 93.

(*y*) 3 Jur. N S. 631, 632.

(*z*) 10 C. B. N. S. 3, 39.

[1] See § 578, n. 1 (*d*), *infra*.

the court always excuses him from producing them (*a*), a similar rule ought to prevail when, under an ordinary subpœna, a witness is asked questions, the answers to which may be equally or even more injurious to him. On the other hand, however, it is to be remembered that the judge is the proper authority to determine all questions relative to the reception of testimony; and consequently to decide whether, taking into consideration all the circumstances, including the demeanour of the person who claims the privilege, an answer to any particular question ought to be exacted (*b*); and that, to allow the witness or party interrogated the exclusive right contended for, would not only introduce an anomaly into the law of evidence, but enable every witness, who might be swayed by improper motives, and be indifferent to his reputation, easily, and with perfect impunity, to evade giving any evidence whatever. The position that a witness or party interrogated ought not to be compelled to show in what precise way a question might injure him, however sound in itself, falls far short of establishing that he is the exclusive judge, not only as to the existence of the facts which might expose him to injury, but also as to the effect of those facts in point of law. Besides, it is a mistake to suppose that every unfounded objection raised by a witness to a question must necessarily have its foundation in mala fides; it may be the result of idle terror or scruples, to give effect to which would be a violation of the well-known principle of law that the fear which excuses an act must not be a vain fear, but a reasonable one, "Qui cadere potest in virum constantem" (*c*). The rule that a witness will not be compelled to produce documents, which he swears are his muniments of title, is in a great degree the offspring of necessity, being based on the immediate and irreparable mischief which would ensue from an erroneous decision of the judge as to the nature of the documents. Still we apprehend that if it could be clearly shown that the statement of the witness as to their character was untrue, the judge would compel their production.

§ 128 A. The whole question came at last before the Queen's Bench in *Reg.* v. *Boyes* (*d*), where the dicta in *Fisher* v. *Ronalds* were distinctly overruled by an unanimous decision of that court. That was an information filed by the Attorney-General, in pursuance of a resolution of the House of Commons, for bribery at an election for members to serve in Parliament; and at the trial, Martin, B., held that a witness who had been pardoned for his share in the transaction was bound to answer questions concerning it. On this ruling

(*a*) Tayl. Ev. §§ 428, 1318.

(*b*) *The People* v. *Mather*, 4 Wend. 229, 254.

(*c*) Co. Litt. 253 b; Lofft's Max. 440. See also Dig. lib. 50, tit. 17, l. 184.

(*d*) 1 B. & S. 311.

being questioned before the Court in Banc, consisting of Cockburn, C. J., Wightman, Crompton and Blackburn, JJ., it was argued that the witness was in jeopardy by being compelled to answer; for although the crown could pardon offences as regards itself, the witness was still liable to an impeachment by the House of Commons, against which, by 12 & 13 Will. 3, c. 2, s. 3, no pardon of the crown could be pleaded. After time taken to consider, the following judgment was delivered by Cockburn, C. J., in the name of himself and the other members of the court: "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made malâ fide, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale, in *Osborn* v. *The London Dock Company* (*e*), and acted upon by Vice-Chancellor Stuart in *Sidebottom* v. *Adkins* (*f*), is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, — there being no doubt, as observed by Alderson, B., in *Osborn* v. *The London Dock Company*, that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril. Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things, — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to

(*e*) 10 Exch. 698, 701. (*f*) 3 Jur. N. S. 631.

afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse, if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. To suppose that such a proceeding would be applied in the case of this witness would be simply ridiculous; more especially as the proceeding by information was undertaken by the Attorney-General by the direction of the House itself, and it would therefore be contrary to all justice to treat the pardon provided, in the interest of the prosecution, to insure the evidence of the witness, as a nullity, and to subject him to a proceeding by impeachment. It appears to us, therefore, that the witness in this case was not, in a rational point of view, in any, the slightest, real danger from the evidence he was called upon to give, when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding judge to compel him to answer."

§ 129. It used to be considered that the witness who intended to claim the privilege of not answering questions of this nature was bound to claim his privilege at once; and that, if he began a criminative statement when he might have refused to make it, he was compellable to go on with it, — a rule probably established with the view of preventing witnesses from converting the privilege given by law for their own protection into a means of serving one of the litigant parties, by setting up the privilege when their evidence began to tell against him. But in *R.* v. *Garbett* (*g*), a majority of the judges overruled the old notion, and held that the witness might claim his protection at any stage of the inquiry.

§ 130. Prior to the passing of the Common Law Procedure Act, 1854, although it was settled that a witness is compellable to answer questions having a tendency to *disgrace* him, as, for instance, whether he was ever convicted of an offence, if the questions be relevant to the issue in the cause (*h*), there was great doubt whether he is also

(*g*) 1 Den. C. C. 236; 2 Car. & K. 495.

(*h*) 2 Phill. Ev. 494, 10th Ed., Ph. & Am. Ev. 916, 917.

compellable to answer questions relating to collateral matters, and only put in order to test his credit.

By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, sects. 25 and 103, a witness in a civil case may be asked whether he has been *convicted* of any felony or misdemeanour; and if he either denies the fact or refuses to answer, the opposite party may prove the conviction. And, by 28 Vict. c. 18, s. 6, — which applies "to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence" (*i*), — a witness may be asked whether he has been *convicted* of any felony or misdemeanour; and if he either denies, or does not admit the fact, or refuses to answer, the cross-examining party may prove the conviction.

These enactments leave the doubt unsolved with regard to questions not named therein; *e. g.*, whether the witness has ever been guilty of a dishonourable act. The better opinion seems to be, that such questions may be put, and must, if the presiding judge require, but not otherwise, be answered, as was shown by *R.* v. *Castro* (the "Tichborne case"), where a witness for the prosecution, on a charge of perjury, was compelled to admit that he had committed adultery (*k*). On this subject (*kk*) three points should be borne in mind: —

1. The object of the cross-examining party is, in general, sufficiently attained by *putting* the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession.

2. Cases may arise where the judge, in the exercise of his discretion, would interpose to protect the witness from unnecessary and unbecoming annoyance; *e. g.*, in answering questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity; and the Rules of the Supreme Court (Order XXXVI. Rule 38) expressly provide that "the judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter."

3. Where a witness is asked a question which tends to disgrace him, and answers the question, the cross-examiner is in general bound by the answer so given, because the question goes only to the credit of the witness, which is a collateral matter, and to admit evidence to

(*i*) Sect. 1.

(*k*) See Charge of Cockburn, C. J., in *R.* v. *Castro*, vol. 2, p. 719, published in 1875; Stephen on Evidence, Article 129, and note xlvi.

(*kk*) See also sections 263 and 644.

contradict him would be to raise a question not relevant to the issue (*l*).

At the beginning of the year 1892 considerable controversy arose in connection with certain questions put to the defendant in *Russell* v. *Russell*, a matrimonial cause tried before Butt, J., and to one of the defendants in *Osborne* v. *Hargreave and Wife*, an action for slander tried before Denman, J., as to the proper limits to the discretion of counsel in cross-examination. In neither case had the judge interfered to stop the questions objected to, and in only one of them had the witness hesitated to answer. The controversy, which was chiefly conducted through the columns of the "Times" newspaper, and which showed a deep dislike on the part of the writers to cross-examination of a witness to credit on the ground of immoral conduct, had no practical result.

The matter is very fully provided for by the Indian Evidence Act, 1872, which was framed by Sir James Stephen when a member of the Supreme Council of India. By s. 148 of that Act if any question to a witness on cross-examination relates to a matter not relevant, except so far as it affects his credit, the court has the duty of deciding whether or not the witness shall be compelled to answer, and may warn the witness that he is not obliged to answer. In exercising its discretion, the court is directed to have regard to the considerations that —

"Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;

"Such questions are improper if the imputations which they convey relate to matters so remote in time, or of such a character, that the truth of the imputation would not affect or would affect in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies;

"Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

"The court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable."

By s. 149 no such question as above "ought to be asked" without reasonable grounds, and by s. 150 if it be asked by a professional man the court may report the circumstances to the authority to which he is subject in the exercise of his profession. By s. 151 the

(*l*) See *R.* v. *Holmes*, L. Rep., 1 C. C. 334; *R.* v. *Hodgson*, R. & R. 211; *R.* v. *Cockcroft*, 11 Cox, C. C. 410; *R.* v. *Clarke*, 2 Stark. 241; overruling *R.* v. *Robins*, 2 Moo. & R. 512.

court may forbid indecent and scandalous questions under certain circumstances, while by s. 152 "the court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form."

§ 131. It was formerly a disputed point whether witnesses were compellable to answer questions the answers to which would subject them to *civil* proceedings (*m*). To set this matter at rest, the 46 Geo. 3, c. 37, was passed, which, after reciting the existing doubts on the subject, proceeded to *declare* and enact that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever (*n*), by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit."

(*m*) 2 Phill. Ev. 492, 493, 10th Ed.; Stark Ev. 203, 204, 4th Ed.

(*n*) As to the nature and extent of the forfeiture spoken of, see *Pye* v. *Butterfield*, 5 B. & S. 829, and the cases there referred to.

CHAPTER II.

INCOMPETENCY OF WITNESSES.

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§ 132. As the reception of, and credit attached to the statements of witnesses by courts of justice, rest on the natural, if not instinctive,

belief which is found to exist in the human mind (*o*), in the *general* veracity of human testimony, especially when guarded by the sanction of an oath, it follows that all testimony delivered under that sanction, and perhaps even without it, ought to be heard and believed, unless special reason appears for doubt or disbelief. And here arises a leading distinction, which runs through the judicial evidence of this and most other countries; namely, that in some instances the special reason is so obvious that the law deems it safer to reject the testimony of the witness altogether; while in others it allows the witness to make his statement, leaving its truth to be estimated by the tribunal (*p*). This is the distinction taken in our books between the *competency* and the *credibility* of witnesses. A witness is said to be *incompetent* to give evidence, when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received, and its credibility weighed by the jury. The present chapter will be confined to the *incompetency* of witnesses.

§ 133. Incompetency in a witness will not be presumed. It comes in the shape of an exception or objection to the witness; and if the facts on which it rests are disputed, they must, like all other collateral questions of fact (*q*), be determined by the judge (*r*); who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of intoxication (*s*), or is an obvious lunatic (*t*), or is of such tender years that the judge deems a preliminary inquiry into his religious knowledge essential (*u*), and the like. But the ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the *voir dire*, — *i. e.*, a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he is rejected (*x*), and even if they are satisfactory, the judge may receive evidence to contradict them, or establish other

(*o*) Introd. pt. 1, § 15.

(*p*) "Summa distinctio et observatio est, testes aut prohiberi penitùs, aut reprobari duntaxat. Prohibentur, qui planè non audiuntur; reprobantur, quibus auditis aliquid objici potest, quo minus fidem mereantur." Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 1. See 1 Hale, P. C. 635; 2 *Id.* 276–277.

(*q*) Bk. 1, pt. 1, § 82

(*r*) *Bartlett* v. *Smith*, 11 M. & W. 483; *R* v. *Hill*, 2 Den. C. C. 254.

(*s*) See the judgment in *Mansell* v. *Reg.* 1 Dearsl. & B. 405. "Ebrietas probatur ex aspectu illius qui asseritur ebrius, &c:" Masc. de Prob. Concl. 579, nn. 5 *et seq.*

(*t*) *Infrà.*

(*u*) *Infrà.*

(*x*) *Yardley* v. *Arnold*, 10 M. & W. 141; *Jacobs* v. *Layborn*, 11 M. & W. 685; *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442.

facts showing the witness to be incompetent (*y*). It sometimes happens that the incompetency of a witness is not discovered until after he has been sworn, and his examination proceeded with a considerable way, or perhaps even brought to a close; under which circumstances the judge ought, it seems, to erase that witness's evidence from his notes, and tell the jury to pay no attention to it (*z*). It has been said, also, that although in regular order the examination on the *voir dire* precedes the examination in chief, yet when a ground of incompetency is thus unexpectedly discovered, the judge may stop the proceedings, and examine on the *voir dire* with the view of ascertaining the fact (*a*).

§ 134, 135 (*b*). The only grounds on which the evidence of a witness can with any appearance of reason be rejected *unheard* are reducible to four:[1] 1. That he has not that degree of intellect which would enable him to give a rational account of the matters in question. 2. That he cannot or will not guarantee the truth of his statements by the sanction of an oath, or what the law deems its equivalent. 3. That he has been guilty of some crime or misconduct, showing him to be a person on whose veracity reliance would most probably be misplaced. 4. That he has a personal interest in the success or defeat of one of the litigant parties. In a word, his rejection should be based on the reasonable apprehension, arising from known circumstances, that his evidence may mislead the tribunal and so cause misdecision. But various classes of persons were rejected by the civilians, and our old lawyers, on a very different ground; viz., that the giving evidence in a court of justice is a right or privilege rather than a duty; and consequently that incompetency to give evidence is a fitting punishment for matters to which the law is desirous of attaching a stigma. And although this is a fallacious and short-sighted view, even when the offence stigmatised is a grave violation of natural or municipal law, the ancient practice went much farther, and affixed the brand of incompetency on erroneous or obnoxious opinions; thus not only punishing the delinquent, but often inflicting ruin on the plaintiff, defendant, prosecutor, or accused person, whose life, property, or honour might have been saved by the evidence of the rejected witness, whose doctrines he

(*y*) *Bartlett* v. *Smith*, 11 M. & W. 483; *Cleave* v. *Jones*, 7 Exch. 421.

(*z*) See *Jacobs* v. *Layborn*, 11 M. & W. 685, and the authorities there cited; *R.* v. *Whitehead*, L. R., 1 C. C. 35; 1 Cox, C. C. 234.

(*a*) Per Rolfe, B., in *Jacobs* v. *Layborn*, *ut suprâ*. See also the resolution of the judges in the *Queen's case*, 2 B. & B. 284.

(*b*) The two sections 134, 135, have been condensed into one by the present editor.

[1] For the result of the American cases, see pp. 177–178.

might nevertheless have held in due abhorrence. There can be no doubt that this mischievous principle was borrowed from the civil law, or, to speak more correctly, from those forms of it which prevailed in the lower empire and the middle ages (*l*). Most of the provisions on the immediate subject are to be found in Cod. lib. 1, tit. 5; according to the 21st constitution of which, bearing date A. D. 532, heretics and Jews were not in general allowed to bear testimony against orthodox Christians. With regard to our law, Sir Edward Coke, in his First Institute, lays down broadly that an infidel cannot be a witness (*o*), but cites no authority; and in his Second Institute (*q*), he tells us that the passage in Bracton, where it is stated that an alien born cannot be a witness, must be intended of an alien infidel. Whether Coke did not overstate the bigotry even of his own time may be questioned, but certain it is that within half a century after his death very different notions had arisen; and the whole subject will be best understood from the powerful exposé of the fallacy of his views by L. C. J. Willes, in his judgment in *Omichund* v. *Barker* (*r*). In that case, a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the Commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath, taken in the usual and most solemn form in which oaths were most usually administered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses in the courts of justice erected by letters patent at Calcutta. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes, C. J., and Parker, C. B.; when, on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the Evangelists, and that the law of England recognised no other form of oath. The case having been learnedly argued on both sides, and the authorities (*u*) fully gone into, each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age; that the substance of an oath is essentially the same in all cases; namely, an invocation

(*l*) See Bonnier, Traité des Preuves, §§ 185 *et seq.*

(*o*) Co. Litt. 6 b.

(*q*) 4 Inst. 279.

(*r*) Willes, 541

(*u*) In the case of *Fachina* v *Sabine*, at the Council, 2 Str. 1104, Dec. 1731, a Moor was sworn on the Koran; and so far back as Mich. 1657, a witness who objected to lay his hand on the book and kiss it, was allowed to swear, it being laid open before him and he holding up his right hand. *Colt* v *Dutton*, 2 Sid. 6.

of a Superior Power to attest the veracity of a statement made by a party, acknowledging his readiness to avenge falsehood, and in some cases invoking that vengeance; consequently, that the mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. They, however, agreed that infidels who do not believe in a God or a state of rewards and punishments cannot be admitted as witnesses; and although from some of the language in that case and in other books, it might be supposed that a belief, on the part of the witness, in *a future* state of reward and punishment is required, the better opinion is, that belief in an Avenger of Falsehood generally is the only thing needful, the time and place of punishment being mere matter of circumstance (*y*).

§ 136. The principles laid down in *Omychund* v. *Barker* have not only been fully adopted into our law and practice (*z*), but are recognised by the stat. 1 & 2 Vict. c. 105; which enacts, that "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted."

§ 137. Our common-law rules as to incompetency seem to have been copied from the civil law, which, however, carried the principle of exclusion much farther; and, indeed, our ancestors probably saw, what is obvious enough in itself, that although an extended prohibition of suspected evidence may be valuable under a system where all questions of law and fact are decided by a single judge, it is misplaced in a country where the tribunal has the aid of a jury, acting either as judges of fact,

(*y*) Tayl. Evid. § 1252; Rosc. Nisi Prius Evid tit. "Examination of Witnesses — Incompetency from defect of Religious Principle:" 1 Greenl. Ev. § 328, 7th Ed. For the discrepancy in the American authorities on this subject, see Appleton on Evidence, 22, 23, 269, 270; and Taylor *in loc. cit.* n. (1). See further on the subject of oaths, Introd. §§ 56 *et seq.*

(*z*) *Maden* v. *Catanach*, 7 H & N. 360; Peake's Ev. 141, 5th Ed.; Ph. & Am. Ev. 8 *et seq*; 1 Greenl. Ev. § 328, 7th Ed.; Judgments of the Barons of the Exchequer in *Miller* v. *Salomons*, 7 Exch. 475; affir. on error, 8 Exch. 778.

as at the present day, or as witnesses, as in former times (*a*); and the Court of Queen's Bench in Lord Kenyon's time laid down as a clear and certain rule for the future that, in order to render a witness incompetent on the ground of interest, it must appear *either* that he was directly interested in the event of the suit; *or* that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own claim (*d*).

§§ 138–141 (*f*). This rule was indeed well defined, and on the whole as good as any that could be devised on such a subject; but the inconsistency of its application, and its inefficiency even in its professed object of obtaining unsuspected evidence, were obvious. It is impossible to calculate, by any rule laid down à priori, the influence which interest in a given cause, or in the event of a given suit, will exercise on the mind of a given individual. On some minds, a very slight interest would act sufficiently to induce perjury; on others very great interests would be powerless. Again, it being equally impossible to detect the numberless ways in which parties may be, directly or indirectly, interested in a particular event, the rule of exclusion was restricted to the case of *legal* interest in the event of the suit; the consequence of which was, that parties were often competent to give evidence who were swayed by the strongest *moral* interests to pervert the truth. Thus the heir apparent to an estate, however large, was a competent witness for his ancestor in possession on an ejectment brought by a stranger claiming the property; while, in an ejectment against a tenant for life, a remainderman who had a legal interest to the amount of the smallest coin in the realm was not competent to give evidence for the defendant (*h*). The principle of this exclusion seems to have varied in different cases. In some — as where the witness had been convicted of perjury, forgery, and the like — it rested, in part at least, on the notion that his testimony was likely to prove mendacious. But the wide range of the rule clearly shows that this form of incompetency, like that for disfavoured religious opinions, was occasionally imposed as a punishment, in order that, by refusing to allow the witness to give evidence in a court of justice, he might be rendered a marked person in society. And this seems supported by the circumstance that at common law a pardon,

(*a*) See bk. 1, pt. 2, § 119.

(*d*) *Bent* v. *Baker*, 3 T. R. 27; *Smith* v. *Prager*, 7 T. R. 60. See also *R.* v. *Boston*, 4 East, 572; and *Doe* d. *Lord Teynham* v. *Tyler*, 6 Bingh 390.

(*f*) The four sections, 138 to 141, have been condensed into one by the present editor.

(*h*) *Id.* 91 *et seq.*

even for perjury, restored the competency of the witness and made him a new man (*n*). But whatever the reason, "repellitur à sacramento infamis" (*o*) was the rule of law; and in determining what offences should be deemed infamous, an artificial distinction was taken which caused the whole system to work very unevenly. We allude to the distinction between the "infamia juris" and the "infamia facti," — between the infamy of an offence viewed in itself, and that arbitrarily attributed to it by law (*p*), — it being a principle that some offences, although "minoris culpæ," were "majoris infamiæ" (*q*). It would be loss of time to enumerate with nicety the offences which were deemed infamous by law; it will be sufficient to say that treason and felony stood at their head, though an exception was created by 31 Geo. 3, c. 35, in favour of petty larceny before the distinction between it and grand larceny was abolished (*r*). A conviction for misdemeanour did not in general render a witness incompetent; but to this there was the general exception of offences coming under the description of the crimen falsi, — such as forgery, perjury, subornation of perjury, various forms of conspiracy, and the like (*s*). Still, every crime involving falsehood or fraud had not this effect.

§§ 142–143. Such was the state of the law on this subject at the time of the passing of 6 & 7 Vict. c. 85, — whereby, after reciting that the inquiry after truth in courts of justice was often obstructed by incapacities created by the then existing law, and it was desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony, it was enacted that no person offered as a witness should be excluded by reason of incapacity from crime or interest from giving evidence, but there followed three provisos, being (1) that no *party* to a suit, or the husband or wife of a party, should be rendered competent to give evidence; (2) that the Wills Act, 7 Will. 4, and 1 Vict. c. 26, should not be affected by the statute, and (3) that in courts of equity a defendant might be examined as a witness on the behalf of the

(*n*) We say *at common law*; for it was otherwise on a conviction of perjury under the 5 Eliz. c. 9, made perpetual by 21 Jac. 1, c. 28, s. 8. The difference is, that in the former case the disqualification only followed as a consequence from the judgment; whereas in the latter it was by the statute made part of the punishment. See this subject fully investigated in 2 Hargrave's Jurid. Argum. 221.

(*o*) Co. Litt. 158 a; Willes, 667.

(*p*) Ph & Am. Ev. 14.

(*q*) Co. Litt. 6 b.

(*r*) Ph. & Am. Ev. 17.

(*s*) *Id.*

plaintiff or of any co-defendant, saving just exceptions; and any interest which such defendant so to be examined might have in the matters, or in any of the matters in question in the cause, should not be deemed a just exception to the testimony of such defendant, but should only be considered as affecting or tending to affect the credit of such defendant as a witness. The first of the above three provisos is repealed, so far as relates to parties to civil proceedings, by the 14 & 15 Vict. c. 99, s. 1; and with respect to their husbands and wives, by 16 & 17 Vict. c. 83, s. 4 (*b*).

§ 144. Not only is the inclination of our modern judges and lawgivers in favour of receiving the evidence of witnesses, leaving its value to be estimated by the jury, but the propriety of expunging from our jurisprudence the title "Incompetency of Witnesses" has been strongly and ably advocated, as well as candidly and temperately defended (*c*). For reasons stated in the Introduction to this work (*d*), it seems that, for general purposes at least, the principle of incompetency ought to be confined to *pre-appointed*, as contradistinguished from *casual* evidence; and the legislature has of late years inclined to this view.[1] While, on the one hand, it has almost abolished the rules rejecting casual witnesses as incompetent, it has, on the other, interposed with regulations requiring certain important pieces of pre-appointed evidence to be attested in some particular way. Thus, the 6 & 7 Vict. c. 85, — which, as we have seen, removes all objections to competency on the ground of interest in most cases, and of infamy in all, — contains an express proviso that nothing in it shall repeal the Wills Act, 7 Will. 4, and 1 Vict. c. 26, by which (as explained by 15 & 16 Vict. c. 24) all wills must be in writing and attested by two or more witnesses; and which, by section 15, enacts that if a will contains any beneficial devise, legacy, gift, &c., to an attesting witness, it shall be void, in order that he may be competent to prove the execution of the will. And the 32 & 33 Vict. c. 62, s. 24, requires that all cognovits, and warrants of attorney to confess judgment, shall be subscribed by an attorney, acting on behalf of the party by whom they are executed, and expressly named by him.

§ 145. We now proceed to consider more in detail the three grounds of incompetency which still exist in our law; namely, 1.° In-

(*b*) See those statutes, *infrà*, pp. 175, 180.

(*c*) Introd. pt. 2, § 62.

(*d*) *Id.*

[1] See § 134, n. 1 (*c*), *supra*.

competency from want of reason and understanding; 2.° Incompetency from want of religion; and 3.° Incompetency from interest.

§ 146. 1.° Incompetency from want of reason and understanding. The causes of this incompetency are twofold, — *deficiency* of intellect, and *immaturity* of intellect. The objection on the first of these grounds rarely presents itself to the *competency* of a witness; and if the defect appears in the course of his examination, it is usually made matter of comment to the jury.

§ 147. Our books lay down generally that persons of "non-sane memory," and who have not the use of reason, are excluded from giving evidence (*e*); but they are not quite agreed as to the reason of this, — some basing it on the ground that such persons are insensible to the obligation of an oath (*f*); while others, with more justice, say it is because all persons who are examined as witnesses must be fully possessed of their understanding, — that is, of such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong (*g*). Probably both reasons have had their influence (*h*). According to the Roman law, "Furiosus absentis loco est" (*i*).

§ 148. But who are thus excluded? What is the extent of the rule? A man of "non-sane memory" is defined by Littleton, "qui non est compos mentis" (*k*). This is corroborated by Sir E. Coke in his Commentary (*l*), who adds, "Many times, as here it appeareth, the Latin word explaineth the true sense, and (Littleton) calleth him not *amens, demens, furiosus, lunaticus, fatuus, stultus,* or the like, for *non compos mentis* is most sure and legal." He then goes on, "Non compos mentis is of four sorts: 1 An idiot, which from his nativity, by a perpetual infirmity, is non compos mentis. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, 'aliquando gaudet lucidis intervallis,' and therefore he is called 'non compos mentis' so long as he hath not understanding. 4 Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken." A similar classi-

(*e*) Com. Dig. Testmoigne, A. 1; Co Litt 6 b; Ph. and Am. Ev. 4; Peake, Ev. 122, 5th Ed.

(*f*) 1 Greenl. Ev. § 365, 7th Ed.; Tayl. Ev. § 1247.

(*g*) Peake's Ev. 122, 5th Ed.

(*h*) Ph. & Am. Ev. 4.

(*i*) Dig. lib. 50, tit. 17, l. 124, § 1. See also 4 Co. 125 b, 126 a.

(*k*) Litt. sect. 405.

(*l*) Co. Litt. 246 b.

fication is adopted in modern works on evidence (*m*). These four sorts of persons are incompetent witnesses until the cause of incompetency is removed. Thus, although a person deaf and dumb from birth is presumed by law to be an idiot (*n*), yet if he can be communicated with either by signs and tokens (*o*), or by writing (*p*), and it appears that he is possessed of intelligence, and understands the nature of an oath (*q*), he may be examined as a witness. In one case, where it appeared that such a person could write, Best, C. J., doubted whether he ought not to be compelled to give his evidence in that way, and not by signs (*r*). But it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from or secondary to the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case, before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination in court, however, was chiefly carried on by signs, and occasionally, when these were not understood, by writing (*s*). So a lunatic while in a lucid interval is a competent witness (*t*); but whether the evidence of a monomaniac — *i. e.*, a person insane on only one subject — can be received on matters not connected with his delusion, remained unsettled until recently. And some text-writers thought it the safest rule to exclude the testimony of such persons, it being impossible to calculate with accuracy the extent and influence of such a state of mind (*u*). This would be hard measure. A monomaniac may perfectly understand the nature and obligation of an oath; his general intellect may equal or surpass that of his interrogators; and indeed he seems much in the condition of a lunatic who is in a perpetual lucid state on all subjects save one. A medical man, eminent in the treatment of the insane, deposed in our presence, in a court of justice, that while he was physician to a large lunatic establishment, some alterations were required in the

(*m*) Ph. & Am. Ev. 4; 1 Greenl. Ev. § 365, 7th Ed.

(*n*) 1 Hale, P. C. 34.

(*o*) 1 Phill. Ev. 7, 10th Ed.; *R.* v. *Ruston*, 1 Leach, C. L. 408; 3 R. R. 705.

(*p*) 1 Ph. Ev. 7, 10th Ed., *Morrison* v. *Lennard*, 3 C. & P. 127.

(*q*) The present editor has here restored the original language of the author; the last editor had, referring to 32 & 33 Vict. c. 68, s. 4, stated it as sufficient that the witness should "understand the difference between truth and falsehood." It is submitted, however, that the act referred to can only refer to the exceptional case of a deaf and dumb person "objecting to take an oath, or objected to as incompetent to take an oath."

(*r*) *Morrison* v *Lennard*, 3 C. & P 127

(*s*) *Bartholomew* v *George*, Kent Sp. Ass. 1851, MS.

(*t*) Com. Dig. Testmoigne, A. 1; Ph. & Am. Ev. 5.

(*u*) Roscoe, Crim. Ev. 123, 4th Ed.

building, and that the best plans for the purpose, and those which were ultimately adopted, were sent in by one of the insane patients. In Ray's Medical Jurisprudence of Insanity (*v*), a case is mentioned which was tried before the Supreme Court for the county of Lincoln, in Maine, America, in May, 1833, in which a witness was produced who was perfectly sane and satisfactory in his evidence on all points, except that he believed himself to be an inspired apostle. And on an application to the Court of Exchequer for a habeas corpus ad testificandum, to bring up the body of a person confined as a lunatic, Parke, B., said, "If you make an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up, the habeas corpus should be granted" (*x*).

§ 149. This question seems now set at rest by the case of *R.* v. *Hill* (*y*), decided by the Court of Criminal Appeal. The accused, who was attendant of a ward in a lunatic asylum, was indicted for the manslaughter of one of the patients under his care. At the trial before Coleridge and Cresswell, JJ., at the Central Criminal Court, it being opened by the prosecution that a witness of the name of Donelly would be called, who was a patient in the same ward with the deceased, evidence was gone into on both sides in order to found and meet the objection to his competency. A witness stated that Donelly laboured under the delusion that he had a number of spirits about him continually talking to him, but that that was his only delusion; and two medical witnesses deposed that he was rational on all points not connected with it; while one added that he was quite capable of giving an account of any transaction that happened before his eyes. Donelly was then called, and before being sworn was examined by the prisoner's counsel. He said: "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire — I can where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears; I do not know how many they are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics;' all are now in my body and round my head; they speak to me incessantly — particularly at night. That spirits are immortal, I am taught by my religion from my childhood, no matter how faith goes, all live after my death, those that belong to me and those which do not, Satan lives after my death, so does the Living God." After more of this kind, he added: "They speak to me constantly; *they are now speaking to me;* they are not separate from me; they are round me, speaking to me now, but I can't be a spirit, for I am flesh and blood; they can go in and go out through walls and places which

(*v*) § 304. *Case of Jacob Schwartz.*
(*x*) *Fennell* v. *Tait*, 1 C. M. & R. 584.
(*y*) 2 Den. & P. C. C. 254.

I cannot. I go to the grave; they live hereafter, — unless, indeed, I have a gift different from my father and mother that I do not know. After death my spirit will ascend to Heaven, or remain in purgatory. I can prove purgatory. I am a Roman Catholic; I attended Moorfields, Chelsea Chapel, and many other chapels round London. I believe purgatory; I was taught that in my childhood and infancy. I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear: it is when God's honour, our own or our neighbour's good require it. When man swears, he does it in justifying his neighbour on a Prayer-book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty; it is perjury, the breaking a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity." He was then sworn, and, says the report, *gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed.* He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked, "Is what you have told us what the spirits told you, or *what you recollect without the spirits?*" and he said, "No; *the spirits assist me in speaking of the date;* I thought it was Monday, and they told me it was Christmas Eve — Tuesday; but I was an eye witness, an ocular witness, &c." The court received his evidence, reserving the question of his competency for the Court of Criminal Appeal. The accused having been convicted, the case was argued before Lord Campbell, C. J., Coleridge and Talfourd, JJ., and Alderson and Platt, BB.; when the counsel for the prisoner contended that Donelly was non compos mentis, but was a lunatic within the legal definition of that term; and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent, citing, inter al., Com. Dig. Testmoigne, A. 1. The court, however, without hearing counsel on the other side, unanimously upheld the conviction. Lord Campbell, in delivering his judgment, said: "The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by Parke, B., in the case that was tried before him, and that it is for the judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. As to the authorities that have been cited, the question is, in what sense the term '*non compos*' was there used. A man may, in one sense, be *non compos*, and yet be aware of the nature and sanction of an oath. In the particular case before the court, I think that the judge was right

in admitting the witness; I should have certainly done so myself. . . . It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in the proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is *primâ facie* admissible, and the jury must attach what weight they think fit to his testimony." Talfourd, J., observing, "it would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions," Lord Campbell added, "The rule which has been contended for would have excluded the testimony of Socrates, for he had one spirit always prompting him" (*y'*).

§ 150. But while our books point out the various causes of mental alienation which disqualify from giving evidence, they say little or nothing as to the intensity of it required for this purpose. In truth, there are two, if not more, distinct standards of mental alienation known to the law. First, that which is sufficient to exculpate from a criminal charge; and here it is settled that ordinary lesion of intellect is not sufficient,— there must be such an absence of intellect that the accused, when he did the act, was unconscious that he was committing a crime prohibited by law (*z*). 2nd. The degree of insanity which will support a commission of lunacy. In the time of Lord Eldon the Court of Chancery assumed, perhaps usurped, the jurisdiction of issuing commissions of lunacy against "persons of unsound mind;" *i. e.*, persons in a state contradistinguished from idiocy and lunacy, — a state of mental imbecility and incapacity to manage their affairs (*a*). 3rd. The degree of unsoundness of mind which will avoid contracts, deeds, wills, and the like seems to hold an intermediate place between these (*b*). Calm reflection will convince that if mental alienation is to be retained in our law as a

(*y'*) See *Waring* v. *Waring*, 6 Moo. P. C. C. 341.

(*z*) Answer of the judges to the House of Lords, 8 Scott, N. R. 595, 1 Car & K 130; *R.* v. *Higginson*, *Id.* 129; *R.* v. *Vaughan*, 1 Cox, Cr. Ca 80.

(*a*) Shelford on Lunacy, pp. 5, 104, 2nd Ed.

(*b*) As to the degree of unsoundness of mind which will avoid a will, the law, as now settled, is, — that the existence on the mind of the testator of a delusion which is compatible with the retention of his general powers and faculties will not avoid the will, unless the delusion were such as was calculated to influence the testator in making it. *Banks* v. *Goodfellow*, L. Rep., 5 Q. B. 549; overruling the dicta on this point in *Waring* v. *Waring*, 6 Moo. P. C. C. 341; and *Smith* v. *Tebbitt*, L. R., 1 P. & D. 398.

ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, as to the reliance to be placed on his testimony. And here it is important to observe, once for all, that when reading what our old lawyers have written on the subject of insanity, we should never forget how little the subject was understood in their days, and the shocking mistakes in the treatment of the insane which then prevailed. As some one has observed, "their notions of insanity were founded on observation of those wretched inmates of the madhouse whom stripes and chains, cold and filth, had degraded to the stupidity of an idiot, or exasperated to the fury of a demon." Now, the researches of modern physiologists have shown that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured; and that there are many inferior forms of diseased or disordered mind and imagination which influence the conduct of persons who are, in other respects, perfectly capable of taking care of themselves and transacting the ordinary business of life (*c*). Some even go so far as to assert that there exists a form of the disease to which they have given the name of "moral insanity," in which no *delusion* of any kind exists; but the patient's moral character is revolutionised, and he is hurried against his will, by some uncontrollable impulse, into the commission of acts of violence and crime (*d*). Although this state of mind is not recognised in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries show how arbitrary and imperfect any line, drawn by law on such a subject as the present, must necessarily be; and as an eminent modern writer well expresses it, "The subtile and shifting transformations of wild passion into maniacal disease, the returns of the maniac to the scarcely more healthy state of stupid anger, and the character to be given to acts done by him when near the varying frontier which separates lunacy from malignity are matters which have defied all the sagacity and experience of the world" (*e*).

(*c*) Viewing the subject in a physiological light, Dr. Beck, in his Medical Jurisp. ch. 13, 7th Ed., enumerates the following forms of mental alienation: 1. Mania; 2. Monomania (including melancholy); 3. Dementia; 4. Incoherent madness (holding a sort of middle place between mania and dementia); 5. Congenital idiotism; besides various subdivisions. He also (p. 487 *et seq.*) mentions some forms of disease, which, either in a partial or temporary manner, bear a strong resemblance to insanity. These are the delirium of fever, hypochondriasis, hallucination, epilepsy, nostalgia, delirium tremens, &c.

(*d*) Beck's Med. Jurisp. 436, 477, 7th Ed.; Dr. F. Winslow, in the papers of the Juridical Society, vol 1, p. 595, &c.

(*e*) Sir J. Mackintosh's Hist. Engl. vol. 3, p. 36.

§ 151. Next, with respect to the evidence of children. *Immaturity* of intellect is of course a ground of incompetency, as much as natural defect or subsequent deprivation of intellect. But there is another difficulty in dealing with this subject; namely, that while the intellect of a child may be sufficiently developed to enable him to give an intelligible account of what he has seen or heard, he may be ignorant, not only of the nature and obligation of an oath, but even of the obligation to speak the truth; and although, in the case of an adult witness, the want of early religious education may have been supplied by experience or reflection, it would be idle to look for these in a person of tender years. For these reasons, the testimony of children has always been a source of embarrassment to tribunals; and the laws of many nations have cut, instead of attempting to unravel, the knot, by arbitrarily rejecting such testimony when the child is under a definite age (*f*), — a course objectionable on many grounds; and principally, as it all but proclaims impunity to certain offences of a serious nature against the persons of children, which it is next to impossible to establish without receiving their account of what has taken place. Besides, children of the same age differ so immensely in their powers of observation and memory that no fixed rule, even approximating to the truth, can be laid down. In this case at least it may truly be said, " Nature makes her mock of those systems of tactics which human industry presents as leading-strings to human weakness" (*g*).

§ 152. As to the old law on this subject: our ancestors adopted the maxim " minor jurare non potest" (*h*), but with some exceptions, — at the age of twelve years, for instance, an infant might be called on to take the oath of allegiance, &c. (*i*). And although, as will be

(*f*) The general rule of the civilians, subject, however, to several exceptions, was, that persons under the age of puberty were incompetent to give evidence (Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 2, iv., Mascard. de Prob. Concl. 1253) Some of their authorities say that minors under twenty years were rejected in criminal cases. Mascard. de Prob. Concl. 1320, n. 9 *et seq* ; and 1253, n. 14. This rule appears to have been based on the language of the Digest; lib. 50, tit. 17, l. 2, § 1, — " Impubes omnibus officiis civilibus debet abstinere; " but more particularly on lib. 22, tit. 5, l. 3, § 5, —" Lege Julia de vi cavetur, ne hac lege in reum testimonium dicere liceret, qui se ab eo, parenteve ejus liberaverit. quive impuberes erunt, &c." — rather a frail foundation for the position that the jurisprudence of ancient Rome rejected the testimony of minors *in general;* for the law just quoted only does so on certain capital charges of public violence. Expressio unius est exclusio alterius; and we have the positive testimony of Quintilian that in his time the evidence even of very young children was occasionally received, or at least was not rejected as matter of course. See Inst. Orat. lib. 5, c. 7, *vers. fin.* The Hindoo law seems to have rejected the evidence of minors under fifteen, — an age in that climate corresponding probably to twenty or more in ours. Translation of Pootee, c. 3, sect. 8, in Halhed's Code of Gentoo Laws.

(*g*) 3 Benth. Jud. Ev. 304.

(*h*) Co. Litt. 172 b.

(*i*) Co. Litt. 68 b, 78 b, 172 b.

shown presently, the evidence of children was often rejected, it was not solely on the ground of their supposed incapacity to take an oath; for a difficulty was likewise felt in fixing the age at which they should be held responsible to the criminal law, — a matter now fully settled thus, that for this purpose fourteen is, with some few exceptions, full age; that between seven and fourteen, an infant is presumed to be doli incapax, but may be shown to be otherwise; but that, under seven, there is (whether rightly or not) a præsumptio juris et de jure that he cannot have a mischievous discretion (*j*).

§ 153. Sir Edward Coke in his 1st Institute (*k*) states broadly that a person "not of discretion" cannot be a witness; and in another part of the same work (*l*) he defines the age of discretion to be fourteen years. More than half a century later, Sir Matthew Hale in his Pleas of the Crown (*m*) lays down the law thus: "Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as, if he be intelligent, or the nature of the fact, may allow an examination of one under that age; as in case of witchcraft, an infant of nine years old has been allowed a witness against his own mother. And the like may be in a rape of one under ten years, upon the stat. of 18 Eliz. c. 6. And the like hath been done in case of buggery upon a boy, upon the stat. 25 Hen. 8, c. 6. And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason." In another place, however (*n*), after telling us that instances have been given of very young witnesses sworn in capital causes, — viz., one of nine years old, — he adds: "Yet such very young people under twelve years old I have not known examined upon oath, but sometimes the court for their information have heard their testimony without oath, which, possibly being fortified with concurrent evidences, may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children." In the case of *Young* v. *Slaughterford* (*o*), T. T. 1709, which was an appeal of murder, tried at bar, L. C. J. Holt held, that an infant under twelve years of age might be admitted as a witness if he knew the danger of an oath; and, that appearing, he was admitted. But in *R.* v. *Travers* (*p*), at the Kingston Spring Assizes of 1726, which was an indictment for a rape on a child under the age of seven years, L. C. B. Gilbert rejected the evidence of the

(*j*) 4 Blackst Comm. 22, 23; 1 Hale, P. C 20 *et seq.*; and *infrà*, bk. 3, pt. 2, ch. 2.
(*k*) Co Litt. 6 b.
(*l*) Co Litt. 247 b.
(*m*) 1 Hale, P. C. 302; see also *Id.* 634; and 2 *Id.* 279.
(*n*) 2 Hale, P. C. 283–284.
(*o*) 11 Mod. 228.
(*p*) 1 Stra. 700.

child, and the prisoner was acquitted. A fresh indictment was then found for assault with intent to ravish, which was tried before L. C. J. Raymond. The child had in the mean time attained the age of seven, and on its evidence being objected to, on the ground that a child six or seven years old ought, for the purposes of testimony, to be considered in the same light as a lunatic or madman, the counsel for the prosecution cited a case at the Old Bailey, in 1698, where C. B. Ward admitted the evidence of a child under ten, who had been examined as to the nature of an oath, and had given a reasonable account of it. The Lord Chief Justice, however, rejected the evidence, and cited the case of one Steward, who was tried at the Old Bailey in 1704, for rapes on two children; in the first of which the child was ten years old, and yet she was not admitted as a witness until other evidence had been given which tended strongly to show the guilt of the defendant, and until the child herself had given a good account of the nature of an oath. The second child was between six and seven years old; and it was unanimously agreed that one so young could not be admitted to be an evidence, and on that ground her testimony was rejected. But although L. C. B. Gilbert rejected the evidence of the child, in the first case of *R.* v. *Travers*, it was probably on the ground that she was ignorant of the nature of an oath, or deficient in natural intelligence; for in his Treatise on Evidence (*q*) he lays down the rule thus: "Children under the age of fourteen are not regularly admitted as witnesses, and yet at twelve they are obliged to swear allegiance in the leet. There is no time fixed wherein they are to be excluded from evidence; but the reason and sense of their evidence is to appear from the questions propounded to them, and their answers to them." And, lastly, during the argument in the case of *Omychund* v. *Barker* (*r*), in 1744, we find L. C. J. Lee informing counsel, who was relying on the language of Sir Matthew Hale in one of the passages above referred to, that it had been determined at the Old Bailey, upon mature consideration, that a child should not be admitted as an evidence without oath; and L. C. B. Parker added, that it was so ruled at Kingston Assizes before Lord Raymond.

§ 154. Through all this inconsistency and confusion we can trace two principles working their way: 1. That if the testimony of an infant of tender years is to be received at all, it ought to be received from the infant itself, and not through a statement helped out by somebody else. 2. That a witness being an infant of tender years, is no ground for relaxing the rule, "In judicio non creditur nisi juratis" (*s*). At length, in 1779, both these principles received a

(*q*) Gilb. Ev. 144, 4th Ed. (*r*) 1 Atk. 29. (*s*) Cro. Car. 64.

solemn judicial recognition in *R.* v. *Brasier* (*t*), which is the leading case on the subject. The prisoner was indicted for an assault with intent to commit a rape, on an infant under the age of seven years, who was not examined as a witness; and the chief evidence for the prosecution was the account she had given of the transaction to two other persons. The prisoner having been convicted, the case was considered by the judges, who decided that the conviction was wrong. They held *unanimously* that "no testimony whatever can be legally received except upon oath, and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received."

§ 155. *Brasier's case* settled the modern law and practice relative to the admissibility of the testimony of children. As in the criminal law, "malitia supplet ætatem" (*u*), so here the maxim of the canonists was followed, "prudentia supplet ætatem" (*x*), — the rule having been thus stated by Alderson, B.: "It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn" (*y*). And although, since the 32 & 33 Vict. c. 68, s. 4, it is no longer necessary, in order to render children of tender years admissible as witnesses, that they should be sworn, or be able to understand the nature and obligation of an oath, yet — inasmuch as their evidence would even now be inadmissible if they appeared not to understand the difference between truth and falsehood (*z*) — it follows, as was said by the court in *Brasier's case*, that their admissibility still depends on "the sense and reason they entertain of the danger and impiety of falsehood; which is to be collected from their answers to questions propounded to them by the court."

(*t*) 1 Leach, C. L. 199; 1 East, P. C. 443. It is to be remarked that, a few years previous, a similar opinion had been expressed by Gould, J., on an indictment for rape on an infant between six and seven years of age. The prisoner having been acquitted on the unsworn testimony of the child, the judge mentioned the matter to the other judges, a majority of whom agreed with him. *R.* v. *Powell*, 1 Leach's Crown Law, 110.

(*u*) Dy. 104 b; 1 Hale, P. C. 26; 4 Blackst. Comm. 23, and 212.

(*x*) Lancel. Inst. Jur. Can. lib. 2, tit. 10, § 5.

(*y*) *R.* v. *Perkins*, 2 Moo. C. C. 139.

(*z*) See *supra*, § 148, n. (*q*).

Whether the child's evidence is admissible, if this "sense and reason" "of the danger and impiety of falsehood" be owing merely to special instruction, given to the child with a view to the trial, and be not the result of the child's general religious education, has been made matter of question. In *R.* v. *Williams* (*a*), which was an indictment for murder, a female child of eight years old was called as a witness. It appeared that, up to the death of the deceased, the child had never heard of God, or of a future state of rewards and punishments, had never prayed, and did not know the nature of an oath; since that time, she had been visited twice by a clergyman, who had given her some instruction as to the nature and obligation of an oath; but she gave a very confused account of it, and had, says the report, "no intelligence as to religion or a future state." Her testimony was objected to on the ground that if it were sufficient that a witness should understand the nature of an oath merely from information communicated, a clergyman might always be called to instruct a witness on that subject, when he came into the box to be examined on the trial. And the counsel for the prosecution having cited *R.* v. *Wade*, 1 Moo. C. C. 86, Patteson, J., said: "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that, previous to the happening of the circumstances to which this witness comes to speak, she had had no religious education whatever, and had never heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." But although there can be no doubt of the correctness of the decision in the above case, nor that the circumstance that the child had been instructed in the nature of an oath after the offence had been committed was one for the judge to consider, when called on to decide as to her capacity to be sworn, the dogma — if, indeed, Patteson, J., intended to lay it down — that the child was incompetent to take an oath, because her sense of the binding obligation of the oath was not the result of her general religious education, was at variance with other authorities (*b*), and is indefensible on principle.

§ 156. When a material witness in a criminal case is an infant of tender years (*c*), the practice has been for the judge to examine him,

(*a*) 7 C. & P. 320.

(*b*) See Tayl. Ev. § 1250, and the cases there referred to. Also the cases cited *infrà*.

(*c*) What shall be considered tender years for this purpose does not appear to be defined, although, by analogy to the general law respecting infancy, the requisite

with the view of ascertaining whether he is aware of the nature and obligation of an oath, and the consequences of perjury. And if it is ascertained *before the trial* that a material witness is of tender years and devoid of religious knowledge, the court will, *in its discretion*, postpone the trial, and direct that he shall in the mean time receive due instruction on the subject (*d*). But in a recent case, where a father was charged with violating his daughter, aged twelve, Alderson, B., refused to postpone the trial for the purpose of her being taught the nature of an oath,—stating that all the judges were of opinion that it was an incorrect proceeding; that it was like preparing or getting up a witness for a particular purpose, and on that ground was very objectionable (*e*). If this be correctly reported, not only is it at variance with a series of previous authorities (*f*), but, as is remarked in the text work where the case is found, "By the strict application of this rule, a parent, by neglecting his moral duty as to the education of his child, may thus obtain an immunity for the commission of a heinous crime" (*g*).

It is well pointed out, in Note xl. to Mr. Justice Stephen's Digest of the Law of Evidence, that "the practice of insisting on a child's belief in punishment in a future state for lying, as a condition of the admissibility of its evidence, leads to scenes little calculated to increase respect either for religion or for the administration of justice;" and the learned author omits want of religious belief in a child as a ground of incompetency. "A witness," he lays down in Article 107, "is incompetent if, in the opinion of the judge, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth." He is of opinion, moreover, that the Act 32 & 33 Vict. c. 68, which allows a witness "objecting to take an oath, or being objected to as incompetent to take an oath," to make a declaration instead of an oath, in event of the presiding judge being satisfied that the oath would have no binding effect on his conscience, applies to the case of a child, on the ground that "if a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, à fortiori, a child who has received no instructions on the subject must be competent also." With all deference to

degree of religious knowledge should be presumed at the age of fourteen. But the court has a right to examine as to the religious knowledge even of an adult, if it suspects him to be deficient. See *infrà*.

(*d*) Stark. Ev. 117, 4th Ed.; 1 Phill. Ev. 9, 10th Ed.; Tayl. Ev 1247; 1 Leach, C. L. 430, n. (*a*); *R.* v. *Nicholas*, 2 Car. & K. 246; *R.* v. *Baylıss*, 4 Cox, Cr. Ca. 23.

(*e*) 1 Phill. Ev. 10, 10th Ed.

(*f*) See *supra*, n. (*d*).

(*g*) 1 Phill. Ev. 10, n. (3), 10th Ed.

the learned author, this view of the statute, which does not appear to have been taken in practice, or to have occurred to or been adopted by any other writer on the subject, is not (though very desirable to be argued) a correct one, on the ground that the child cannot "object to" what it does not, ex hypothesi, know the nature of, and that the words "objected to," although grammatically they may include the case of a child, must from their collocation be cut down to the case of an adult. It is greatly to be desired, however, that the act should be applied in express terms to children appearing to the court to be proper subjects for its application.

A very important though partial amendment of the Law of Evidence in this respect has been made by the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, s. 4. This section, which makes it a felony to have carnal knowledge of a girl under 13, and a misdemeanour to attempt that crime, enacts that where the girl in respect of whom the offence has been committed, or any other child of tender years, who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such girl or other child may be given unsworn if, in the opinion of the court, the child "is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth," but the proviso is added that no person may be convicted upon the testimony so given unless it be corroborated by some other material evidence in support thereof implicating the accused.

§ 157. On trials for homicide, the general rule of law which rejects second-hand or hearsay evidence is relaxed so far as to render admissible the declarations of the deceased as to the cause of his death, provided they were made by him at a time when he was under the conviction that death was impending (*h*). This exception has been allowed, partly from necessity, partly on the ground that the situation of the party may fairly be taken, as conferring on what he says a religious sanction equal to that supplied by an oath, and partly because, on such occasions, witnesses rarely have any interest in deceiving. But as, when children of tender years are examined as witnesses, the court has the security of inquiring into their intelligence and religious knowledge, it seems to follow that their dying declarations are not *primâ facie* receivable where those of an adult would be; for the latter will be rejected if it appears that the deceased was a person who, through ignorance or any other cause, was not likely to be impressed with a religious sense of his approach-

(*h*) See *infrà*, bk. 3, pt. 2, ch. 4.

ing dissolution (*i*). In *R.* v. *Pike* (*j*), two prisoners were indicted for the murder of a child *four* years old. It was proposed to put in evidence a statement made to her mother by the child, shortly before her death, at a time when she thought she was dying, as to the manner in which she had been treated by the prisoners. Park, J. (with the concurrence of Parke, B.), rejected the statement, saying: "As this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. . . . Indeed, I think that from her age we must take it that she could not possibly have had any idea of that kind." But without in the least questioning the propriety of the *decision* in this case, we may well doubt whether the above *dictum* can be supported. There certainly is no præsumptio juris et de jure on this subject; and however unlikely it may be that a child of four years old should have clear ideas respecting religion and divine punishment for falsehood, yet if that fact were shown affirmatively, its dying declarations ought to be received. In *R.* v. *Perkins* (*k*), it was held by the judges on a point reserved, that the dying declarations of a child *ten* years old were receivable under such circumstances. But the question still remains, at what age is the presumption of the absence of intelligence, and of ignorance on religious subjects, to cease, so as to render this affirmative proof unnecessary? Analogy points to fourteen years, but judicial decisions are silent.

§ 158. As to the effect of the evidence of children when received: "Independently of the sanction of an oath," says a text work (*l*), "the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons; and what is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive.[1] It is clear that a person may be legally convicted upon such evidence, alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined

(*i*) See *infrà*, bk. 3, pt. 2, ch. 4.
(*j*) 3 C. & P. 598.
(*k*) 2 Moo. C. C. 135.
(*l*) Ph. & Am. Ev. 7.

[1] "To them (children) it is a matter of interest to pay particular attention to the precise words which people utter in their presence. They are usually passive recipients of other persons' ideas and expressions; whereas a grown person, when he hears a statement, is apt to content himself with the substance of it, and to modify it in his own mind, and may be afterwards unable to trace back his ideas to the original impressions:" Amos, Great Oyer of Poisoning, 277.

by them on a review of all the circumstances of the case, and especially of the manner in which the evidence of the child has been given." Quintilian (*m*) reckons among doubtful proofs "parvulorum indicia; quos pars altera nihil fingere, altera nihil judicare dictura est." This must not, however, be taken too literally: some children indulge in habits of romancing, which often lead them to state as facts circumstances having no existence but in their own imaginations; and the like consequence is not unfrequently induced in other children by the suggestions or threats of grown-up persons, acting on their fears and unformed judgments.

§ 159. 2.° The next ground of incompetency may be styled "incompetency from want of religion." To the natural and moral sanctions of the truth of statements made by man to man, it has been usual in most, if not in all ages and countries, to join the additional security of "An Oath;" *i. e.*, a recognition by the speaker of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered, and in some cases calling down His vengeance in the event of falsehood (*n*). On this principle, courts of justice in most nations exact an oath as a condition precedent to the reception of evidence; and among us in particular, "In judicio non creditur nisi juratis" (*o*) has been a legal maxim from the earliest time. Hence it followed that, by the common law, the evidence of a witness must be rejected who either was ignorant of, or who denied the existence of, such a superior power, or refused to give the required security to the truth of his testimony; and the present source of incompetency may accordingly be considered under three heads: 1st, Want of religious knowledge; 2nd, Want of religious belief; and 3rd, Refusal to comply with religious forms.

§ 160. The first of these may be disposed of in a word, the exception arising principally in the case of children, whose competency has already been considered (*p*). But the same principles apply where an adult, deficient in the requisite religious knowledge, is offered as a witness (*q*).

§ 161. 2nd, Incompetency for want of religious belief. This has been in a great degree anticipated in a former part of this chapter (*r*), where we took occasion to show the injustice and absurdity of the old practice of inflicting incompetency as a punishment for erroneous

(*m*) Inst. Orat. lib. 5, c. 7, *vers. fin.*

(*n*) See as to Oaths, Introd. pt. 2, §§ 56 *et seq.*

(*o*) Cro. Car. 64.

(*p*) *Suprà*, §§ 151 *et seq.*

(*q*) *R.* v. *White*, 1 Leach, C. L. 430; *R.* v. *Wade*, 1 Moo. C. C. 86.

(*r*) *Suprà*, §§ 134 *et seq.*

opinions, or even for misconduct not likely to affect the veracity of the witness. The history of our law on this subject was there traced, — the gradual establishment of the great and sound principles that courts of justice are not schools of theology; that the object of the law in requiring an oath is to get at the truth relative to the matters in dispute, by obtaining a hold on the *conscience* of the witness; and consequently that every person ought to be admitted to give evidence who believes in a Divine Being, the Avenger of falsehood and perjury among men, and who consents to invoke, by some binding ceremony, the attestation of that Power to the truth of his deposition. But how is the state of mind of the proposed witness on these subjects to be ascertained? It is clear that disbelief in the existence and moral government of God are not to be presumed (*s*). If such disbelief exist, this is a psychological fact, and is consequently incapable of proof except by the avowal of the party himself,[1] or the presumption arising from circumstances (*t*). According to most of our text-writers and the usual practice, the proper and regular mode of procedure is by examining the party himself (*u*); while some authorities go so far as to assert that this is the only mode (*v*). Professor Christian, on the other hand, informs us that he "heard a learned judge declare at nisi prius that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity and a future state" (*x*); and he adds that "it is probably more conducive to the course of justice that this should be presumed till the contrary is proved. And the most religious witness may be scandalised by the imputation which the very question conveys." This last is a strange argument; for the most respectable witness may be scandalised by *questions* imputing to him any possible form of crime, and yet such questions may be and frequently are put; and it is essential for the ends of justice that the right to put them should exist. Some of the American authorities adopt the conclusion of Professor Christian, but for different reasons. Witnesses, say they, are not allowed to be questioned as to their religious belief, not because it tends to disgrace them, but because it would be a personal scrutiny into the state of

(*s*) 6 Co. 76 a; 1 Greenl. Ev. §§ 42, and 370, 7th Ed.

(*t*) Introd. pt. 1, § 12.

(*u*) Ph. & M. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.; *The Queen's case*, 2 B. & B. 284; *R.* v. *Taylor*, 1 Peake, 11; *R.* v. *White*, 1 Leach, C. L. 430; *R.* v. *Serva*, 2 Car. & K. 56; see also 1 & 2 Vict. c. 105.

(*v*) Ph. & Am. Ev. 12; Rosc. Crim. Ev. 127, 4th Ed.

(*x*) 3 Christ. Blackst. 369, n. 14.

[1] For some consideration of the American law, see Scott *v.* Hooper, 14 Vt. 535; Harrel *v.* State, 1 Head (Tenn.), 125; U. S. *v.* White, 5 Cranch, C. C. 38, acc.; State *v.* Townsend, 2 Harr. (Del.) 543; Smith *v.* Coffin, 6 Shep. 157; Jackson *v.* Gridley, 18 Johns. 98; Com. *v.* Burke, 82 Mass. 33; Wakefield *v.* Ross, 5 Mason, 16, 19, *contra*.

their faith and conscience, foreign to the spirit of free institutions, which oblige no man to avow his belief (*y*). Others of them, however, assign as the reason "that the witness could not be permitted in court to *explain* or *deny* the declarations imputed to him, because it would be *incongruous* to admit a man to his oath for the purpose of ascertaining whether he had the necessary qualifications to be sworn" (*z*). But surely these views are extreme. On the one hand, if a witness may be questioned as to his religious opinions, it can only be on the assumption that a knowledge of them would in some way assist the tribunal; in which case they become facts in issue, and any legitimate evidence affecting them ought to be received. Very strong proof would doubtless be required to induce a court to disbelieve the answers of a witness on these subjects; for the question is not what his religious opinions have been at any former period, but what they are at the moment when he is standing in the box. On the other hand, it is an abuse of the great principles of civil and religious liberty to object to such an examination as inquisitorial. The object of it is, not to pry into the speculative views of the witness, but to enable the tribunal to estimate his trustworthiness, — in accordance with which it is fully established that he cannot be questioned as to any *particular* religious opinion, or even whether he believes in the Old or New Testament. No question can be asked beyond whether he believes in a God the Avenger of falsehood, and will designate a mode of swearing binding on his conscience (*a*); and if he complies with these, he cannot be asked whether he considers any other mode *more* binding, for such a question is unnecessary and irrelevant (*b*). And it is apprehended that although these questions may be *put*, a witness, if (having been brought up as a Christian) he be an atheist or a theist, is not bound to *answer*; for by so doing he exposes himself to an indictment under the 9 & 10 Will. 3, c. 32, and perhaps also at common law; and it is an established principle that no man is bound to criminate himself (*c*).

§ 162. The ordinary form of swearing in English courts of common law is well known. The witness, holding the New Testament (*d*) in his bare right hand, is addressed by the officer of the court in a form which varies according to the nature of the proceedings.

(*y*) 1 Greenl. Ev. § 370, n. (2), 7th Ed.

(*z*) Appleton on Evid. pp. 26, 27.

(*a*) See *Maden* v. *Catanach*, 7 H. & N. 360.

(*b*) So held by the judges in *The Queen's case*, 2 B. & B. 284.

(*c*) *Suprà*, ch. 1, §§ 126 *et seq.*

(*d*) Strictly speaking, this should be the four Evangelists; but the distinction is disregarded in practice. From the fact of the book being held in the hand, the oath is sometimes termed the "corporal oath."

In criminal cases, when the accused is in custody, it runs thus:

"The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth: So help you God."

When the accused is not in custody the form is the same, except that he is then described as "the defendant."

In civil cases it is —

"The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth: So help you God."

The witness then kisses the book.

But if a witness allows himself to be sworn in either of these forms, or in any other form, without objecting, he is liable to be indicted for perjury if his testimony prove false (*e*).[1]

§ 163. Numerous instances are to be found in our books of the application of the principle that witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland (*f*), and others (*g*), who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them; and swearing with "uplifted hand" in the Scotch manner is expressly made permissible by the Oaths Act, 1888, 51 & 52 Vict. c. 46, s. 5, which enacts that the oath shall be administered to a person who desires to swear, "without further question." In Ireland, Roman Catholics are (or at least were) sworn on a New Testament with a cross delineated on the cover (*h*). Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God" to "So help you Jehovah." Mohammedans are sworn on the Koran, and the ceremony adopted in *R.* v. *Morgan* (*i*) is thus described. The book was produced. The witness first placed his right hand flat upon it, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head; he then looked for some time upon it; and on being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. In a recent case a different course was followed. The officer of the

(*e*) *Sells* v. *Hoare*, 3 B. & B. 232; 1 & 2 Vict. c. 105.

(*f*) *Mee* v. *Reid*, 1 Peake, 23.

(*g*) *Colt* v. *Dutton*, 2 Sid. 6; *Muldrone's case*, 1 Leach, C. L. 412; *Walker's case*, *Id.* 498.

(*h*) MacNally, Ev. 97.

(*i*) 1 Leach, C. L. 54.

[1] For American rule, see Gill *v.* Caldwell, Breese, 28; State *v.* Keene, 26 Me. 33; Doss *v.* Birks, 11 Humph. 431; The Merrimac, 1 Benedict, 490; Com. *v.* Buzzell, 16 Pick 153, 157; State *v* Whisenhurst, 2 Hawks, 458; Fuller *v.* Fuller, 17 Cal. 605, 612, acc.

court asked the witness what form of oath he deemed binding on his conscience, who replied, the oath in the usual words, provided he were sworn on the Koran; and he was sworn accordingly. In another case a similar question was put to a Parsee witness, who was sworn in the same manner, except that instead of the Koran he was sworn on a book which he brought with him (*k*). According to the report of *Omychund* v. *Barker* (*l*), part of the ceremony of swearing a Hindoo consists in his touching the foot of a Bramin, or, if the party swearing be himself a priest, then he touches the Bramin's hand; but if this is deemed by their religion essential to the validity of an oath, it is obvious that Hindoos cannot be sworn in countries where no Bramins are to be found. This, however, appears not to be their only form of swearing (*m*); and we understand that, at least in some parts of India, the natives are sworn on a portion of the water of the Ganges. A Chinese witness has been sworn thus (*n*): On getting into the witness-box he knelt down, and a china saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The officer then administered the oath in these words, which were translated by the interpreter into the Chinese language: "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer" (*o*).

§ 164. Whether this deference to the conscience of witnesses would be carried so far as to allow a form of oath involving rites which our usages would pronounce improper or indecent, — as, for instance, the sacrifice of an animal, which was often resorted to in ancient, and occasionally even in modern times (*p*); or the swearer placing his hand under the thigh of the person by whom the oath is administered, as was the custom of patriarchal times (*q*), — has not been settled by authority. The great question in all such cases would be whether the ceremony suggested was malum in se, and the

(*k*) These statements were made on the authority of the late Mr. Coleman, senior clerk to the late L. C. B. Pollock.

(*l*) 1 Atk. 21.

(*m*) Goodeve, Evid. 76, 77; 1 Stra. Hindu Law, 311.

(*n*) *R.* v. *Entrehman*, Car. & M. 248. See also Peake, Ev. 141, n. (*f*), 5th Ed.

(*o*) According to a newspaper report, this form was followed at the Middlesex Sessions, April 2, 1855, in a case of *R.* v. *Sichoo*, with the addition that the saucer was filled with salt.

(*p*) See Genesis, xv. 9 *et seq.* Grotius de Jur. Bell. ac. Pac. lib. 2, c. 13, § 10; Liv. lib. 1, c. 24. It is said that in the island of Hong Kong, even since it came into the possession of the British, part of the ceremony of swearing a Chinese witness consisted in the cutting off the head of a live cock or live fowl. Berncastle's Voyage to China, vol. 2, p. 39.

(*q*) Genesis, ch. xxiv. ver. 2; ch. xlvii. ver. 29.

scruples of the witness against being sworn in any other way were expressed bonâ fide; or whether they were affected merely with the view of evading the obligation of an oath, or turning the administration of justice into ridicule.

§ 165. Atheism, and other forms of infidelity which deny all exercise of divine power in rewarding truth and punishing falsehood, remained untouched by *Omychund* v. *Barker* and the above decisions, and continued to be recognised as grounds of incompetency (*r*). But it was gravely questioned whether this state of the law ought to be maintained, at least so far as *casual* evidence was concerned? Was it wise to leave it in the power of every man whose breast was the repository, perhaps the sole repository, of evidence affecting the lives and fortunes of his fellow-citizens, to stifle that evidence by pretending to hold erroneous views on the subject of religion? And even supposing the atheism, epicureanism, &c., to be ever so unfeigned and genuine, was it not more properly an objection to the *credit* than to the *competency* of the witness? — for it amounted simply to this, that out of *four* sanctions of truth *one* had no influence on his mind (*s*). The only case, as had been well observed, in which "Cacotheism," or bad religion, was a legitimate ground for the exclusion of testimony, was where a man belonged to a religion the god of which ordained perjury (*t*); and the fanatic whose creed allowed mendacity in private and false swearing in public (*u*) was more dangerous in the witness-box than

(*r*) See *Maden* v. *Catanach*, 7 H. & N. 360.

(*s*) 5 Benth. Jud. Ev. 125, 126. See also Introd. pt. 1, §§ 16 *et seq.* and pt. 2, § 55.

(*t*) See Benth. Jud. Ev. bk. 9, pt. 3, ch. 5, s. 2.

(*u*) "Of all the religious codes known, the Hindoo is the only one by which, in the very text of it, if correctly reported, a licence is in any instance expressly given to false testimony, delivered on a judicial occasion, or for a judicial purpose. . . . Cases, some extra judicial, some judicial, and upon the whole in considerable variety and to no inconsiderable extent, are specified, in which falsehood, false witness, false testimony, are expressly declared to be allowable. 1. False testimony of an exculpative tendency, in behalf of a person accused of any offence punishable with death. Three cases, however, are excepted, viz., — 1. Where the offence consists in the murder of a Bramin; or 2. (what comes to the same thing) a cow; or 3. In the drinking of wine, the offender being, in this latter case, of the Bramin caste. . . . In the representation of the other cases, scarce a word could be varied without danger of misrepresentation; word for word they stand as follows: 'If a marriage for any person may be obtained by false witness, such falsehood may be told; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles at that time, if three or four falsehoods be asserted, it does not signify; or if, on the day of marriage, a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable. If a man, by the impulse of lust, tells lies to a woman, or if his own life would otherwise be lost, or all the goods of his house spoiled, or if it is for the benefit of a Bramin, in such affairs falsehood is allowable.'" Benth. Jud. Ev. vol. i. pp. 235, 236. The above passages will be found in the translation of Pootee, ch. 3, s. 9, in Halhed's Code of Gentoo Laws. See

any form of infidel that could present himself. Even atheism, as was justly remarked by Lord Bacon (*x*), "leaves a man to sense, to philosophy, to natural piety, to laws, to reputation: all which may be guides to an outward moral virtue, though religion were not; but superstition dismounts all these, and erecteth an absolute monarchy in the minds of men." And whatever might have been urged formerly in favour of the exclusion in question, it seemed inconsistent to retain it at the present day; since the 6 & 7 Vict. c. 22, had allowed the reception, in the British colonies, of the unsworn testimony of the members of certain barbarous and uncivilised races, who are described in that statute (whether truly or not is immaterial to our present purpose) as "destitute of the knowledge of God and of any religious belief." A similar change in the law on this subject had been effected by the recent legislation of some of the United States of America, whereby the want of religious belief was treated as an objection to the *credit*, not to the *competency* of a witness (*y*). And, as we shall see presently, our own legislature has at length adopted these views (*z*).

§ 166. The third ground remains to be noticed; namely, the refusal by the person called as a witness to comply with religious forms, — in other words, to guarantee the truth of his testimony by the sanction of an oath in any shape. A perverse refusal to be sworn was treated as a contempt of court; but great difficulty had arisen in modern times, from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths, relying on the command in the New Testament, "Swear not at all" (*a*), and not accepting the explanation given by the Church of England that this command applies to "vain and rash swearing" only (*b*). In some instances the legislature, satisfied that these scruples were bonâ fide, judiciously gave way to

further on this subject, Goodeve, Evid. 114, 115; and the Ordinances of Menu, ch. 8, § 112, translated by Sir William Jones. Mascardus lays down that if a priest be examined as a witness to prove what was stated to him in confession, "potest dicere *se nihil scire*, ex eo quod illud, quod scit, scit ut Deus, et ut Deus non producitur in testem, sed ut homo, et tanquam homo ignorat illud, super quo producitur." Mascardus, de Prob. Quæst. 5, nn. 50, 51; 1 Greenl. Ev. § 247, 7th Ed.

(*x*) Bacon's Essay on Superstition.

(*y*) Appleton, Evid. App. 272, 277, 278.

(*z*) See 32 & 33 Vict. c. 68, s. 4.

(*a*) Matt. v. 34.

(*b*) Article 39 declares that "As we confess that vain and rash swearing is forbidden Christian men by our Lord Jesus Christ, and James his apostle, so we do judge that Christian religion doth not prohibit, but that a man may swear when the magistrate requireth, *in a cause of faith and charity*, so it be done according to the Prophet's teaching, in justice, judgment, and truth." The words italicised might perhaps be construed as requiring that the witness should have satisfied himself of the merits of the case in which he appears. See a letter of the present editor to the "Law Journal" of Feb. 20, 1892, at p. 134.

them, and interposed for the relief of the parties by substituting for an oath a solemn affirmation or declaration, rendering, however, a false affirmation or declaration punishable as perjury. The statutes on this subject at first extended only to Quakers (*c*), Moravians (*d*), Separatists (*e*), and persons who had been Quakers or Moravians, but having ceased to be such, still continued to object conscientiously to taking oaths (*f*). The difference in the forms of affirmation given by these statutes is singular. In the case of Quakers and Moravians it runs thus: —

"I, *A. B.*, being one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], do solemnly, sincerely, and truly declare and affirm," &c.

With the Separatists it is: —

"I, *A. B.*, do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare," &c.

In the two remaining cases the form is: —

"I, *A. B.*, having been one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm."

Members of other Christian sects, the tenets of which recognised the lawfulness of oaths, were still compellable to be sworn in criminal cases; but with respect to civil cases, it was enacted by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 20, that if any person called as a witness, &c. should refuse, or be unwilling from alleged conscientious motives to be sworn, the court or judge, &c., upon being satisfied of the sincerity of such objection, might permit such person, instead of being sworn, to make affirmation as follows; viz.: —

"I, *A. B.*, do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c. This enactment was extended to criminal cases by 24 & 25 Vict. c. 66, but it did not repeal the particular enactments as to Quakers, Moravians, and Separatists, above mentioned; nor are they repealed by the Oaths Act, 1888, mentioned below, and they appear to be still in

(*c*) 3 & 4 Will 4, c. 49, s. 2.
(*d*) *Id.*
(*e*) 3 & 4 Will 4, c. 82.
(*f*) 1 & 2 Vict. c. 77.

force, having been more than once, it is conceived, passed over by Statute Law Revision Acts.

These enactments, however, clearly applied only to persons who declined to take an oath on religious grounds, and left untouched the case of the atheist, who might either decline to take an oath on irreligious grounds, because, having no religion at all, he wishes to make profession of that fact, or might be objected to as incompetent on the grounds already pointed out (*h*).

The case of the atheist was first provided for by the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 4, which applied to *every person called to give evidence* in any court of justice, *whether in a civil or criminal proceeding,* who *should object to take an oath, or should be objected to as incompetent to take an oath;* and which enacted that such person should, *if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience,* declare as follows: —

"I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth" (*i*).

But inasmuch as this Act did not apply to the *promissory* oath of allegiance appointed to be taken by members of Parliament before taking their seats (*ii*), a declared atheist, on becoming a member, was placed in a position of great difficulty. He could not affirm, for only those could affirm who came within the express exemption which applied only to Quakers, or other persons having no religious belief, and he could not take an oath, being disqualified for so doing by common law. A tedious and prolonged controversy between the House of Commons and Mr. Bradlaugh, one of its members, arising out of this unexpected state of things, was terminated by the passing of the general Oaths Act, 1888, 51 & 52 Vict. c. 46, by which, repealing the Act of 1869 and eight other enactments (*j*), —

"Every person upon objecting to being sworn, and stating as the ground of such objection *either* that he has no religious belief

(*h*) See sect. 165, *ante*

(*i*) Doubts having arisen as to the extent and meaning of the words "courts of justice" and "presiding judge," in the above statute, it was, by the 33 & 34 Vict. c. 49, s. 1, enacted, that these words should "be deemed to include any person or persons having, by law, authority to administer an oath for the taking of evidence." See, *e. g.*, Stat Law Rev. Act, 1890 (No. 2), 53 & 54 Vict. c. 51

(*ii*) *Clarke* v. *Bradlaugh*, 7 Q. B. D. 38 C A. reversed by the House of Lords, but on the ground only that a common informer could not sue for the penalty under the Parliamentary Oaths Act, 1866, 8 App. Cas. 354.

(*j*) The repealed enactments are: 17 & 18 Vict. c. 125, s. 20; 19 & 20 Vict. c. 102 (Ireland) ss. 23, 24; 24 & 25 Vict. c. 66; 28 & 29 Vict. c. 9 (Scotland); 30 & 31 Vict. c. 35, s. 8; 31 & 32 Vict. c. 39 (Scotch Jurors); 31 & 32 Vict c. 75 (Irish Jurors); 32 & 33 Vict. c. 60, s. 4; and 33 & 34 Vict. c. 49.

or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law; which affirmation shall be of the same force and effect as if he had taken the oath," — persons falsely affirming being made liable, of course, to the same penalties as those of perjury. By s. 2, "every such affirmation shall be as follows: 'I, *A. B.*, do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of oath prescribed by law, omitting any words of imprecation or calling to witness."

By s. 3 of the same Act, "where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath."

There are, however, some practical difficulties in connection with the Oaths Act, as was shown by *Reg.* v. *Moore & Another* (*j'*), which came before the Court of Criminal Appeal early in 1892. There, a native of India, who was competent to take an oath, was allowed by an usher to affirm; and his competence to take the oath having been discovered on cross-examination, a conviction obtained on his evidence was set aside, it being clear that the conditions under which the Act allows an oath to be substituted for an affirmation — that the witness should object, *and* state, *either* that he has no religious belief, *or* that the taking of an oath is contrary to his religious belief — had not been complied with. Other difficulties may arise from the conduct of cavilling or scrupulous or unwilling witnesses; and it may perhaps be doubted whether it would not be wise to amend the Act by allowing any witness to affirm on simply declaring, without any reason, his desire to substitute an affirmation for an oath, if indeed it be desirable to retain oaths at all (*j''*).

§ 167. 3.° Incompetency from interest. The 6 & 7 Vict. c. 85, abolishing incompetency in witnesses on the ground of their interest in the matter in question, has been already referred to (*k*). And although, by the operation of that and subsequent enactments,

(*j'*) *Reg.* v. *Moore & Another*, 61 L. J., M. C. 80.

(*j''*) "Profoundly convinced by a long judicial experience of the general worthlessness of oaths," wrote "J. M." in 1874, "I have become an advocate for the abolition of oaths as a test of truth."

Would it not be the most desirable course (especially as we are now on the threshold of the admitting all accused persons as witnesses) to substitute affirmations for oaths in every case, to print on each subpœna a statement of the punishment of perjury, and to add a repetition of such statement to the affirmation which each witness is about to make?

(*k*) *Suprà*, § 143.

competency may now be looked on as the rule, and incompetency the exception, still it will be advisable to treat the whole subject of incompetency from interest as it existed at the common law, and then to point out the extent to which it has been modified by statute (*l*).

§ 168. First, then, of the parties to the suit.[1] "Nemo in propriâ causâ testis esse debet" (*m*) was the rule of the old law, — a rule which applied equally to civil and to criminal proceedings (*n*); and which, according to the best authorities, was founded *solely* on the interest which the parties to the suit were supposed to have in the event of it (*o*). Consequently, when it appeared that they had none, or that any which they ever had, had been removed, their evidence was receivable; as, for instance, where one of several defendants suffered judgment by default; or had a nolle prosequi entered against him, under circumstances which rendered him indifferent to the result of the contest between his companions and the plaintiff, &c. So if, in the course of the trial, it appeared to the court that there was no evidence against some or one of several defendants, it would, *in its discretion*, direct a verdict to be taken for him or them before the others were called on for their defence (*p*); because, otherwise, a prosecutor or plaintiff might in many cases have obtained an unjust verdict, merely by making defendants of all the witnesses who could give evidence in favour of that defendant who was his real adversary (*q*).

§ 169. There were several common-law exceptions to this part of the rule in question. The first which we shall notice was perhaps more apparent than real; viz., that the prosecutor of an indictment or information is in general a competent witness against the accused (*r*). The reason of this is that in contemplation of law the suit is the suit of the crown, instituted not to redress the injury done

(*l*) As to the law in the various United States of America, see page 177.

(*m*) 1 Blackst. Comm. 443; 3 *Id.* 371. See also Co. Litt. 6 b. It was the same in the civil law: see Dig. lib. 22, tit. 5, l. 10; Cod. lib. 4, tit. 20, l. 10; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 6.

(*n*) *R.* v. *Payne*, L. Rep., 1 C. C. 349.

(*o*) Gilb. Ev. 130, 4th Ed.; Ph. & Am. Ev. 47; *Worrall* v. *Jones*, 7 Bingh. 395; *Pipe* v. *Steel*, 2 Q. B. 733.

(*p*) *Creswick's case*, Clayt. 37, pl. 64; *Anon.*, 1 Mod. 11, pl. 34; *White* v. *Hill*, 6 Q. B. 487; *Wakeman* v. *Lindsey*, 14 Q. B. 625; and the authorities in the next note.

(*q*) 12 Ass. pl. 11 & 12; *Dymoke's case*, Sav. 34, pl. 81; *Neilau* v. *Hanny*, 2 Car. & K. 710.

(*r*) "A doner evidence, chescun serra admitte pur le roy." Staundf. P. C. lib. 3, c. 8, 163 a.

[1] But see for American law, Eastman *v.* Moulton, 3 N. H. 156; Weed *v.* Bishop, 7 Conn. 128; Webb *v.* Pindergrass, 4 Harr. (Del.) 439; Robbins *v.* Merritt, 31 Me. 451.

to the person by whom the law is set in motion, but to punish the offender for disturbing the peace of the sovereign and the good order of society. And hence the appellor in an *appeal* of felony, while that mode of proceeding was in use, was not a competent witness against the appellee; for the suit was his own (*s*). The prosecutor of an indictment, &c., has not in general any direct pecuniary interest in the result; for although under certain statutes he may be awarded his costs, yet this is discretionary with the judge, and does not flow as a necessary consequence from a verdict of conviction. "But," as is observed in a book published before the passing of 6 & 7 Vict. c. 85 (*t*), "although, in general, a prosecutor or party aggrieved has no interest in the event of a prosecution, and is therefore a competent witness, there are several classes of cases in which, by virtue of some legislative enactment, he is entitled to a particular benefit or advantage, upon obtaining a conviction of the party accused. In these cases, where the benefit or advantage will immediately result to the witness on a conviction being obtained, the witness will be interested, and he will be incompetent, unless the general rule of law be dispensed with in the particular case, either by some legislative enactment, or some principle of public policy requiring that his evidence shall be received." The most important instance of this latter exception is in the case of prosecutions for robbery or theft; where the party injured was competent, notwithstanding he became entitled to a restitution of his property, immediately upon obtaining a conviction of the offender (*u*).[1]

§ 170. A striking exception to the common-law rule which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become *approvers*, which has been replaced by the modern practice of receiving the evidence of *accomplices*, — the "socii vel auxiliatores criminis" of the civilians. The necessity for admitting this kind of evidence has been recognised by the laws of all countries, and the practice is of extreme antiquity in our own (*x*).

(*s*) 2 Hale, P. C. 281, 282.
(*t*) Ph. & Am. Ev. 66.
(*u*) *Id.* 67.
(*x*) Approvers are mentioned in the ancient treatise entitled "Dialogus de Scaccario," p. 426. See also 12 Edw. IV. 10 B. pl. 26; 2 Hen. VII. 3 A. pl. 8.

[1] So, in civil actions at common law, the plaintiff has been allowed, in America, to testify from the necessity of the case. Queener *v.* Morrow, 1 Cold. 123; Williams *v.* Frost, 39 Mo. 516, 518; Herman *v.* Drinkwater, 1 Greenl. 27; County *v.* Leidy, 10 Barr, 45, Parmelee *v.* McNulty, 19 Ill. 556; Sparr *v.* Wellman, 11 Mo. 230. But see Snow *v.* Eastern R. R., 12 Metc. 44; Garvey *v.* R. R., 1 Hilt. 280, *contra*.

The reasons for it were thus explained by a very able judge, on an important occasion (*y*): "If it should ever be laid down as a practical rule in the administration of justice, that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue, because it must not only happen that many heinous crimes and offences will pass unpunished, but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked purposes, and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required. No such rule is laid down by the law of England or of any other country." At first sight it might seem that, previous to the 6 & 7 Vict. c. 85, the objection to the testimony of such persons would have been properly ranged under infamy of character; but as objections of that nature could only be supported by proof of a conviction for an offence, and judgment of the court thereon (*z*), it followed that a confession by a witness of any conduct, however infamous, only went to his credit; so that the true ground of objection to the evidence of approvers or accomplices arises from the obvious interest which they have to save themselves from punishment by the conviction of the accused against whom they appear. The old law of approvement, and the modern practice of admitting the evidence of accomplices, are thus fully and clearly stated by Lord Mansfield in *R.* v. *Rudd* (*a*): "The law of approvement, in analogy to which this other practice" (*i. e.*, of receiving the evidence of accomplices) "has been adopted and so modelled as to be received with more latitude, is still in force, and is very material. A person desiring to be an approver must be one *indicted* of the offence, and *in custody* on that indictment; he must confess himself guilty of the offence, and *desire* to accuse his accomplices; he must likewise upon oath discover, not only the particular offence for which he is indicted, but all *treasons* and *felonies* which he *knows of;* and after all this, it is in the discretion of the court whether they will assign him a coroner, and admit him to be an approver or not; for if, on his confession, it appears that he is a *principal* and tempted the others, the court may refuse and reject him as an approver. When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the *whole truth.* For this purpose, the coroner puts his appeal into form; and when the

(*y*) L. C. J. Abbott's Charge to the Grand Jury on the Special Commission in March, 1820; 33 How. St. Tr. 689.

(*z*) *Supra*, § 142.

(*a*) Cowp. 331, 335.

prisoner returns into court, he must repeat his appeal, without any help from the court, or from any bystander. And the law is so nice that if he *vary* in a *single circumstance*, the whole falls to the ground, and he is condemned to be hanged; if he fail in the colour of a horse, or in circumstances of time, so rigorous is the law that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover *the whole truth;* and in all these cases the approver is convicted on his own confession. See this doctrine more at large in Hale's Pleas of the Crown, vol. 2, p. 226 to 236; Staundf. Pl. Crown, lib. 2, c. 52 to c. 58; 3 Inst. 129. — A further rigorous circumstance is, that it is necessary to the approver's own safety that the jury should believe him; for if the partners in his crime are not convicted, the approver himself is executed. Great inconvenience arose out of this practice of approvement. No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to many objections. And though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see what has come in the room of this practice of approvement. A kind of *hope*, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. . . . The accomplice is not assured of his pardon, but gives his evidence *in vinculis*, in custody; and it depends on the title he has from his behaviour whether he shall be pardoned or executed."

§ 171. But although in strictness a jury may legally (except where two witnesses are required by law) convict on the unsupported evidence of an accomplice or *socius criminis* (*b*), yet it is a rule of general and usual practice — now so generally followed as almost to have the force of law — for the judge to advise the jury not to convict on the evidence of an accomplice *alone* (*c*).[1] It is not, however, every participation in a crime which will render a party an

(*b*) For the practice of the civil law on this subject, see Mascard. de Prob. Concl. 158.

(*c*) Per Wightman, J., *R.* v. *Boyes*, 1 B. & S. 311, 320. "In the United States the general rule in reference to the testimony of accomplices is to advise the jury not to convict unless the testimony is corroborated; but this is only a rule of practice, and not a rule of law."

[1] See § 596, n. 1 (*e*).

accomplice in it, so as to require his evidence to be confirmed (*d*), and the nature of the confirmation in each case must of course depend very considerably on its peculiar circumstances. But a few general principles may be stated. First, then, it is not necessary that the story told by the accomplice should be corroborated in every circumstance he details in evidence; for if this were so, the calling him as a witness might be dispensed with altogether (*e*). Again, notwithstanding some old cases to the contrary, it seems now settled that the corroboration should not be merely as to the *corpus delicti*, but should go to some circumstances affecting the identity of the accused as participating in the transaction (*f*). "A man," says Lord Abinger, "who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all" (*g*). It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person (*h*). Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other (*i*).

§ 172. When an issue was directed from the Court of Chancery to be tried in a court of law, it was frequently made part of the order that the plaintiff or defendant should be examined as a witness.

So when a cause was referred to arbitration from a court of law, it was usually part of the rule that the arbitrator should be at liberty to examine the parties.

§ 173. The first general statutory exception to the rule against admitting parties to the suit as witnesses was contained in the repealed County Courts Act, 1846, 9 & 10 Vict. c. 95. That statute, after remodelling the county courts, and extending their jurisdiction, enacted in its 83rd section that "On the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath, or solemn affirmation in those cases in which persons are by law allowed to make affirmation

(*d*) *R.* v. *Hargrave*, 5 Car. & P. 170; *R.* v. *Jarvis*, 2 Moo. & R. 40.

(*e*) 31 How. St. Tr. 980.

(*f*) *R.* v. *Farler*, 8 C. & P. 106; *R.* v. *Addis*, 6 C. & P. 388; *R.* v. *Webb*, *Id.* 595; *R.* v. *Wilkes*, 7 C. & P. 272; *R.* v. *Moores*, *Id.* 270; *R.* v. *Dyke*, 8 C. & P. 261; *R.* v. *Stubbs*, 1 Dearsl. C. C. 555.

(*g*) *R.* v. *Farler*, 8 C. & P. 108. Similar language was used by Parke, B., in *R.* v. *Parker*, Kent Sp. Ass. 1851, MS.

(*h*) *R.* v. *Neal*, 7 C. & P. 168.

(*i*) 31 How. St. Tr. 1122–1123; *R.* v. *Noakes*, 5 C. & P. 326; *R.* v. *Magill*, Ir. Circ. Rep. 418.

instead of taking an oath, to be administered by the proper officer of the court." But this enactment, which, from having become a part of the general law, is not reproduced in the County Courts Act, 1888, must not be looked on as an innovation introduced for the first time; for the old Courts of Conscience and Courts of Requests Acts contained similar provisions.

§ 174. Several other exceptions to the rule excluding the evidence of parties to a suit or proceeding were introduced by modern statutes, until the term "incompetency of parties" was almost abolished by the 14 & 15 Vict. c. 99. That statute, after in its first section repealing the proviso in the first section of the 6 & 7 Vict. c. 85, which retained the exclusion of the evidence of such parties, enacted as follows: —

Sect. 2. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 3. "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, &c."

The 4th section provided that nothing in the Act should apply to any proceeding instituted in consequence of adultery; or to any action for breach of promise of marriage (*k*); and the 5th that nothing in the Act contained should repeal any provision in the Wills Act, 7 Will. 4, and 1 Vict. c. 26.

§ 175. The other persons affected by this rule of exclusion were the husbands and wives of the parties to the suit or proceeding. Husband and wife, say our books, "are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a

(*k*) Repealed by 32 & 33 Vict. c. 68, s. 1. See *infrà*, § 180.

witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case" (*l*). This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband and wife;[1] but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired.[2] But the rule only applied where the husband or wife was party to the suit or proceeding in which the other was called as a witness, and did not extend to collateral proceedings between third parties. In such cases, husband and wife might be examined as witnesses, although the testimony of the one tended to confirm or contradict that of the other (*m*). And the declarations of a wife, acting as the lawfully constituted agent of her husband, were admissible against him, like the declarations of any other lawfully constituted agent (*n*).[3]

§ 176. To this branch also common-law exceptions are not wanting. Where one of the married parties used or threatened personal violence to the other, the law would not allow the supposed unity of person in husband and wife to supersede the more important principle that the state is bound to protect the lives and limbs of its citizens (*o*). Thus, on an indictment against a man for assault and battery of his wife, or vice versâ, the injured party is a competent witness (*p*); and husband and wife may swear the peace against each other (*q*).[4] So a husband may be principal in the second degree to a rape on his wife, and she is a competent witness against him (*r*);

(*l*) Bac. Ab. Evidence, A. 1. See also 2 Hawk. P. C. c. 46, sect. 16; *Davis* v. *Dinwoody*, 4 T. R. 678: *Hawkesworth* v. *Showler*, 12 M. & W. 45; *O'Connor* v. *Majoribanks*, 4 M. & Gr. 435; *Barbat* v. *Allen*, 7 Exch. 609.

(*m*) 1 Phill. Ev. 72, 10th Ed.; Tayl. Ev. 1235.

(*n*) 1 Phill. Ev. 78 *et seq.*, 10th Ed.

(*o*) 2 Hawk. P. C. c. 46, s. 16; Peake's Ev. 173, 5th Ed.; 1 East, P. C. 455; B. N. P. 287; 1 Phill. Ev. 80, 10th Ed.

(*p*) B. N. P. 287; *R.* v. *Azire*, 1 Str. 633.

(*q*) *Anon.*, 12 Mod. 454; B. N. P. 287.

(*r*) 1 Phill. Ev. 80, 10th Ed.; 2 Hawk. P. C. c. 46, s. 16; *Lord Audley's case*, 3 How. St. Tr. 402, 413; Hutt. 115, 116.

[1] See § 578, n. 1 (*e*).

[2] See § 578, n. 1 (*d*).

[3] See § 519, n. 1 (*b*), (5).

[4] For the American law, see State *v.* Davis, 3 Brev. (S. C.) 3; State *v.* Dyer, 59 Me. 303; People *v.* Northrup, 50 Barb. 147; State *v.* Brown, 67 N. C. 470; People *v.* Fitzpatrick, 5 Parker, C. R. 26, acc. So a wife may be a witness in behalf of her husband on trial of an alleged assault committed by the husband upon the wife. Com. *v.* Murphy, 4 All. 491; State *v.* Neill, 6 Ala. 685. See also State *v.* Bennett, 31 Ia, 24.

but principal in the first degree he cannot be, for obvious reasons (*s*). So if a husband commits an unnatural offence with his wife, she is a competent witness against him (*t*). The case of abduction also falls within this exception. On indictments under the repealed stat. 3 Hen. 7, c. 2, for forcibly taking away a woman, the female, though afterwards married to the offending party, was a competent witness against him; the reasons assigned for which by Mr. Justice Blackstone (*u*) are, that "in this case she can with no propriety be reckoned his wife, because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do, if by forcibly marrying a woman he could prevent her from being a witness, who is perhaps the only witness, to that very fact." This statute was replaced by 9 Geo. 4, c. 31, s. 19, now replaced by sect. 53 of 24 & 25 Vict. c. 100, by which section "where any woman of any age has any interest, absolute or contingent, in any real or personal estate, or whoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry her, is guilty of felony," while by sect. 54, "whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry her, is guilty of felony." The female so taken away is a competent witness on an indictment under these enactments; and it is said that she is so, notwithstanding her subsequent assent to the marriage, and voluntary cohabitation (*x*).

§ 177. The case of bigamy presents some difficulty. The first wife, or husband, as the case may be, is not a competent witness against the accused; but our books say that the second wife or husband is, *after proof of the first marriage,* for that then the second marriage is a nullity (*y*); and the practice is in accordance with this.[1] The truth, however, seems to be, that the second wife ought to be received in these cases as a witness against the accused, at any stage of the trial, on the same grounds which render the testimony of the wife receivable on indictments for abduction, under the 3 Hen. 7, c. 2, 9 Geo. 4, c. 31, and 24 & 25 Vict. c. 100 (*z*). It is an established principle that a woman is a competent witness against any one, even her lawful husband, who has done unauthorised violence, actual or

(*s*) 1 Hale, P. C. 629.

(*t*) *R.* v. *Jellyman*, 8 C. & P. 604.

(*u*) 1 Blackst. Comm. 443. See *Swendsen's case*, 14 How. St. Tr. 559, 575; and per Abbott, C. J., in *R.* v. *Serjeant*, Ry. & Mo. 352.

(*x*) 1 Ph. Ev. 83, 10th Ed.; Tayl. Ev. § 1236, 5th Ed.

(*y*) Tayl. Ev. § 1231, 5th Ed.; Rosc. Crim. Ev. 142, 4th Ed.

(*z*) *Suprà*, § 176.

[1] So in America. Shaak's Est, 4 Brews. 305, acc.

constructive, to her *person;* and besides, on a trial for bigamy, the objection to the competency of the injured female, on the ground that she is the wife of the accused, is a petitio principii. For whether she is his lawful wife, or whether he has violated the law by pretending to make her such, is the very point at issue. How strange, then, does it seem, that where, by a combination of falsehood, fraud, and sacrilege, a man obtains possession of a woman's person, property, and perhaps affection, her mouth is to be stopped against him because she is colourably his wife. This latter reasoning of course does not so strongly apply to rendering the second *husband* competent on a charge of bigamy brought against a female; but the first does, — viz., that lawful marriage or wrongful marriage, in violation of the peace of the Queen, is the direct point in issue.

§ 178. What is the rule on this subject in cases of high treason is a disputed point. Many eminent authorities lay down that in such cases the testimony of married persons is receivable against each other (*a*), on the ground of the great heinousness of the crime; and that the ties of allegiance to the sovereign, and the obligation of upholding social order, are more binding than those arising out of the relation of husband and wife, and must in the eye of the law be considered paramount to any other obligations whatever. To this it may be added, that although marriage is an institution of natural law, and as such antecedent to all forms of government, and even to the organisation of civil society (*b*), the complete unity of person between husband and wife is a fiction, which the law disregards in cases where the ends of justice require it (*c*). There is, however, high authority the other way (*d*); and most of the modern text-writers seem disposed to consider the evidence not receivable (*e*). They argue that, as a woman is not bound to discover her husband's treason (*f*), by parity of reason she cannot be a witness against him to prove it. But to this it may be answered, that one reason why the wife is not held responsible in such a case is, that she owes her husband a kind of allegiance, and may be supposed to be acting under his coercion, — we are not aware that a *husband* would be excused from the guilt of misprision in concealing the treason of his *wife.* Under the old feudal law in this country, when the vassal

(*a*) So *said* (not decided, for that was not the point in question) by the court in *Mary Grigg's case,* M. 12 Car. II., T. Raym. 1. To the same effect are Gilb. Ev. 133, 4th Ed.; B. N. P. 286; 2 Ev. Poth. 311.

(*b*) Pufendorf, De Jure Nat. & Gent. lib. 6, cap. 1.

(*c*) See *supra,* §§ 176, 177.

(*d*) 1 Hale, P. C. 301. See also 48.

(*e*) Ph. & Am. Ev. 161; 1 Ph. Ev. 72, 10th Ed.; 1 Greenl. Ev. § 345, 7th Ed.; Tayl. Ev. § 1237, 5th Ed., &c.

(*f*) *Anon.,* P. 10 Jac. I., 1 Brownl. 47; Trials per Pais, 371. See, however, 1 Hale, P. C. 48.

took the oath of fealty to his lord, it was with the express saving of the faith which he owed to the king his sovereign lord (*g*); probably on the principle stated by Lord Chief Baron Gilbert, that our "allegiance is founded on the benefit of our protection, which is to take place of our civil interests that relate only to well-being" (*h*). But the question is an embarrassing one, on which the reader must form his own judgment.

§ 179. The statutory exceptions to this rule are now extremely numerous. So early as the 21 Jac. 1, c. 19, s. 6, the commissioners of bankruptcy were empowered to examine upon oath the wife of any bankrupt, for the purpose of finding out and discovery of the estates, goods, and chattels of the bankrupt concealed, kept, or disposed of by her; and this provision has been re-enacted in substance by the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, ss. 96, 97, and subsequently by the Bankruptcy Act, 1883, 46 & 47 Vict.

§ 180. The clause in the repealed County Courts Act, 9 & 10 Vict. c. 95, which rendered the parties to suits competent witnesses in those courts, extended, as has been seen, to "their wives and all other persons" (*i*). But in the superior courts, the subsequent statute 14 & 15 Vict. c. 99, while it removed the restriction on the parties themselves in almost all cases (*j*), contained in its 3rd section an express clause that nothing therein contained should, "in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband," — language which gave rise to a doubt whether husbands and wives were not thereby, by implication, rendered competent witnesses for and against each other in *civil* proceedings. This, after some conflict of opinion, was determined in the negative (*k*), — whether rightly or not is now immaterial to discuss; for by the 16 & 17 Vict. c. 83, s. 4, the proviso in the 6 & 7 Vict. c. 85, which continued the incompetency of the husbands and wives of the parties to a suit, &c., was repealed, and the following provisions were enacted: —

Sect. 1. "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evi-

(*g*) Litt. sects. 85–89.
(*h*) Gilb. Ev. 134, 4th Ed.
(*i*) *Suprà*, § 173.
(*j*) *Suprà*, § 174.
(*k*) *Stapleton* v. *Crofts*, 18 Q. B. 367; *Barbat* v. *Allen*, 7 Exch. 609; *M'Neillie* v. *Acton*, 17 Jur. 661.

dence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

Sect. 2. "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery."

Sect. 3. "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

And now by the 32 & 33 Vict. c. 68, it is enacted as follows: —

Sect. 2. "*The parties to any action for breach of promise of marriage shall be competent to give evidence in such action:* provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

Sect. 3. "*The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding:* provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question, tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

§ 181. The 14 & 15 Vict. c. 99, s. 4, as has been seen (*l*), retained the incompetency of the plaintiff and defendant in all proceedings instituted in consequence of adultery (*m*). And by sect. 48 of the 20 & 21 Vict. c. 85, which created the Court for Divorce and Matrimonial Causes, it was enacted that the rules of evidence observed in the superior courts of common law at Westminster should be applicable to and be observed in the trial of all questions of fact in that court. The effect of the 32 & 33 Vict. c. 68, s. 3 (*n*), there-

(*l*) *Suprà*, § 174.

(*m*) But a petition for restitution of conjugal rights, to which an answer had been filed, charging adultery, was held not to be within the Act. *Blackborne* v. *Blackborne*, L. Rep., 1 P. & D. 563.

(*n*) See *suprà*, § 180.

fore, is to render competent as witnesses, in that court, the parties to any proceeding instituted therein in consequence of adultery, and the husbands and wives of such parties.

By the 22 & 23 Vict. c. 61, s. 6, it is enacted, that "On any petition presented by a wife, praying that her marriage may be dissolved, by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion." And it was held, that a petitioner or respondent, who was examined under that section upon an issue of cruelty or desertion, might be *cross-examined* on the question of his or her adultery (*o*). But since the 32 & 33 Vict. c. 68, s. 3, a witness cannot be cross-examined, even in mitigation of damages, as to any act of adultery respecting which he or she has not been examined in chief, — the language of that section being, "that no witness *in any proceeding . . . shall be liable to be asked or bound to answer* any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding, in disproof of his or her alleged adultery" (*p*).

§ 182. We have seen that 14 & 15 Vict. c. 99, having by its second section removed the incompetency of parties in general, retained, by its third section, the incompetency of persons charged in any criminal proceeding. In this state of the law arose, in 1854, the case of *Attorney-General* v. *Radloff* (*r*), — which was an information in the Exchequer by the attorney-general for an alleged violation of the revenue laws; and in which the question was raised, whether the defendant was rendered a competent witness by 14 & 15 Vict. c. 99, or whether revenue proceedings were criminal proceedings within that enactment. Pollock, C. B., before whom the case was tried, held his evidence inadmissible; and a verdict having been given for the crown, a rule was granted for a new trial, on the ground that the witness had been improperly rejected. After argument and time taken to consider, the barons, differing in opinion, delivered their judgments separately; Pollock, C. B., and Parke, B., holding that the witness had been rightly rejected, and Platt and Martin, BB., that he ought to have been received. The rule for a new trial accordingly dropped; but several enactments have since been passed, with the view of settling the law on this subject. These enactments (*s*) culminated in sect. 34 of the Crown Suits Act, 1865,

(*o*) *Boardman* v. *Boardman*, L. Rep., 1 P. & D. 233.

(*p*) *Babbage* v. *Babbage*, L. Rep., 2 P. & D. 222.

(*r*) 10 Exch. 84.

(*s*) "The first two attempts (17 & 18 Vict. c. 122, s. 15; 18 & 19 Vict. c. 96, s. 36) failed from want of competent skill in the

28 & 29 Vict. c. 104, s. 34, by which 14 & 15 Vict. c. 99, ss. 2 and 3, and 16 & 17 Vict. c. 83, are fully applied to revenue proceedings.

The general exception for criminal proceedings properly so called, so carefully retained by 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, has of late years been recently much broken in upon; and no less than 16 statutes, passed during the last twenty years, will be found to contain special provisions, enabling persons accused of various crimes to give evidence on their own behalf. This important branch of the law of evidence is reserved for separate consideration in a later chapter (*c*).

§ 183. We will now advert to certain persons who, in consequence of their peculiar position or functions, may seem incompetent to give evidence; and foremost among these stands THE SOVEREIGN. It has been made a question whether he can be examined as a witness in our courts of justice, and if so, whether the examination must be on oath in the usual way. Conceding, of course, that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative; and of this opinion are some modern text-writers (*d*). It has been objected that as the tribunal, at least the Court of Queen's Bench, represents the sovereign, there is an absurdity in asking him to give testimony to himself; but the same might be said of his pleading before himself, which nevertheless takes place in all criminal trials, — where the sovereign is represented in one sense by the court, and in another by the attorney-general, or those who act for him. In 2 Rol. Abr. 686, H. pl. 1, is the following passage: "Semble que le roy ne poet estre un testimonie en un cause per son lettres desouth son signett manuell. Contra Hobard's Rep. 288, enter Abigny et Clifton en Chancery allow." But in *Omichund* v. *Barker* (*e*), L. C. J. Willes says, "Even the certificate of the king under his sign manual of a matter of fact (except in one old case in Chancery, Hob. 213) has been always refused." The case referred to in these books seems to be that of *Abignye* v. *Clifton*, Hob. 213, temp. Jac. I., in which the question was concerning a promise supposed by the plaintiff to be made to him, of assurance of land upon the marriage of his lady, being daughter and heir apparent to Lord Clifton and his lady. "The king," says the report, "by his letters under his signet manual certified to the late Lord Chancellor, and also to this, the manner and substance of the promise as it was made to His Majesty;

draughtsman; the third (20 & 21 Vict. c. 62, s. 14) only partially succeeded." Taylor on Evidence, § 1225.

(*c*) See post, bk. iii. pt. ii. ch. xi.; and see also sections 555–558, post.

(*d*) Tayl. Ev. § 1246, 5th Ed. See Ph. & Am. Ev. 8.

(*e*) Willes, 550.

in regard whereof His Majesty gave to the Lord Abignye £18,000 in lieu of £1,000 per annum in land, which he had promised, which certificate was allowed upon the hearing for a proof, without exception, for so much." This case stands alone, and amounts to little. 1. The evidence was admitted without exception taken. 2. It is probable that the reason for admitting it was, not that, propter honoris respectum, the sovereign could not be examined as a witness, but a forced analogy between the certificate of the king and the certificate of marriage given by a bishop, &c. And this view derives some confirmation from the fact that, in the same reign, in a case of *Alsop* v. *Bowtrell* (*f*), the Court of King's Bench held for sufficient proof of a marriage at Utrecht a certificate under the seal of the minister there, and of the town, that the parties had been married there, and that they cohabited for two years together as man and wife, — a decision condemned by C. J. Willes in *Omichund* v. *Barker*, and clearly not law at the present day. Perhaps, also, as the certificate in *Abignye* v. *Clifton* related to a grant of money by the crown, the court may have confounded it with a royal charter; but in any view of that case, it is far from being a judicial determination, that the testimony of the sovereign can *in general* be received without oath. Sir Matthew Hale also seems to have thought otherwise, for he says (*g*): "If a man be indicted of high treason, the king cannot by his great seal or *ore tenus* give evidence that he is guilty, for then he should give evidence in his own cause. Nay, although he may in person sit on the king's bench, yet he cannot pronounce judgment in case of treason, but it is performed by the senior judge; for as he cannot be a witness, so he cannot be a judge *in propriâ causâ*. And the same law is for felony for the same reason, yet in some cases the king's testimony under his great seal is allowable as, in an essoin de servitio regis, the warrant under the great seal is a good testimonial of it." If the sovereign is an incompetent witness under any circumstances, the whole of this passage is unmeaning and irrelevant. The only authorities, however, which Hale cites for the position that even in criminal cases the sovereign cannot give evidence, are the old records of the reversal in Parliament, in the 1 Edw. III., of the attainders in the preceding reign, of the Earl of Lancaster and the Mortimers (*h*); which certainly do not bear it out. For the ground of the reversal of those judgments appears clearly, from the records themselves, to have been that the accused were not arraigned and tried by their peers in due course of law, but the king's asseveration of their guilt was taken as conclusive (*i*). In

(*f*) Cro. Jac. 541.

(*g*) 2 Hale, P. C. 282.

(*h*) These records are set out at length in 1 Hale, P. C. 444, and 2 *Id.* 217, respectively.

(*i*) If the general lawlessness of the

Taylor on Evidence (*k*) it is stated, on the authority of Lord Campbell in his Lives of the Chancellors, that "the point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the king for the purpose of proving certain conversations which he had held with him while prince. The subject was referred to the judges; but they, acting under the direction of His Majesty, forbore from giving any opinion, and the question remains to this day undetermined." In *The Attorney-General* v. *Radloff* (*l*), Parke, B., said incidentally, for it was wholly needless to the decision of the case, "It is clear that the sovereign cannot be a witness because there is no means of compelling her attendance;" but it is submitted that this dictum, unless it is to be confined to the compellability of the sovereign, is not good law, and that the sovereign may give evidence, though on oath only. The decision in the *Berkeley Peerage case* (*ll*) not to admit after his death a letter signed by George the Fourth in his lifetime does not seem to affect the question. It only remains to add, that no inference can be drawn from the fact that in the various cases of discharging firearms and throwing missiles at the sovereign which have occurred from time to time (*m*), the sovereign was not examined as a witness. For in proceedings for assault or other personal injury it is not requisite, as matter of law, that the injured party should appear in the witness-box; his absence is only matter of observation, which, in the case of the sovereign, would be fully answered by the inconvenience of calling such a witness, so long as any other satisfactory proof could be procured.

§ 184. The other persons to whom we have alluded as apparently incompetent to give evidence are the counsel and solicitors engaged in a cause, and the judges and jurymen by whom it is tried. With respect to one of these there is no difficulty; for it is settled law and every day's practice that a solicitor is a competent witness either for or against his client; although neither solicitor nor counsel will be permitted, without the consent of the client, to disclose matters communicated to him in professional confidence (*n*). But whether

times of Edw. II. should be deemed insufficient to account for this enormous irregularity, even in a state prosecution, a solution for it may be found in the views of the middle ages. For instance, in the laws of Wihtræd, King of Kent, about the beginning of the 8th century, § 16, we read, "Let the word of a bishop and of the king be without an oath, incontrovertible." See *ad id.*, Pufendorf, De Jur. Nat & Gent. lib. 4, cap. 2, § 2, *vers. fin.* Devot. Inst. Canon. lib. 3, tit. 9, § xii., n. 1, 5th Ed.

(*k*) § 1246, 4th Ed.

(*l*) 10 Exch. 84, 94.

(*ll*) See Law Journal newspaper for July 4, 1891.

(*m*) See the cases of *Hadfield* in 1800, 27 How. St. Tr. 1282; of *Collins* in 1832, 5 C. & P. 305; of *Oxford* in 1840, 9 *Id.* 525, &c.

(*n*) *Infrà*, bk. 3, pt. 2, ch. 8.

the counsel in a cause are competent witnesses was formerly a disputed question. In a case of *Stones* v. *Byron* (*o*), which was tried before a sheriff, the plaintiff appeared by his attorney, who acted as his advocate, and who, after the witnesses on both sides had been examined, made a speech in reply, and proposed to call himself as a witness to contradict the defence set up. This was objected to, but allowed by the sheriff; and a rule for a new trial having been granted, on the ground that the evidence ought to have been rejected, the case came on for argument before Patteson, J., in the Bail Court. In support of the rule it was argued that "it would be a practice attended with the most mischievous consequences if an attorney or any other person, acting as the advocate of a party, could afterwards present himself before the jury as a witness, to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favour to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate from those which they had heard from the same person as witness." The only authorities cited were the precedent in the case of Sir Thomas More (*p*), — where the then solicitor-general, who was conducting the prosecution, left the bar and was received as a witness for the crown, which the counsel in *Stones* v. *Byron*, quoting the language of Lord Campbell in his Lives of the Chancellors, pronounced an "eternal disgrace of the court who permitted such an outrage on decency," — and the observations of the Court of King's Bench in *R.* v. *Brice* (*q*), where it was held, that the prosecutor of an indictment has no right to address the jury and state the case for the prosecution; for this, among other reasons, that "the prosecutor may be, and generally is, a witness; and that it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath." It appears, however, that in a case of *R.* v. *Milne*, reported in a note to *R.* v. *Brice*, Lord Ellenborough held, that a prosecutor who waived his right to give evidence was not even then entitled to address the jury. The true ground of the practice unquestionably is, that in contemplation of law the suit is the suit of the crown, and the prosecutor no more interested in it than any other witness (*r*). Patteson, J., in the case we are now considering,

(*o*) 4 Dowl. & L. 393; 1 B. C. R. 248; Mich. 1846.

(*p*) 1 How. St. Tr. 386, 390.

(*q*) 2 B. & A. 606.

(*r*) 2 Rol. Abr. 685, "Testimonies," pl. 5; *R.* v. *Brice*, 2 B. & A. 606.

took the view of the defendant's counsel, and made the rule absolute, saying that he did not think the course of proceeding adopted at the trial was proper, or consistent with the due administration of justice; that the evidence of the attorney ought not to have been received; and that, having been received, there ought to be a new trial In a subsequent case of *Dunn* v. *Packwood*, also in the Bail Court (*s*), a rule for a new trial was moved for, on the ground that the plaintiff's attorney had acted as an advocate in the cause, and had then irregularly given evidence as a witness. On showing cause, the case of *Stones* v. *Byron* was referred to, but sought to be distinguished in this way, that, in the case then under consideration, the attorney simply opened his client's case and then presented himself as a witness, and did not comment on the evidence offered by the other party, as was done in *Stones* v. *Byron*. Erle, J., however, made the rule absolute, saying, "I think it a very objectionable proceeding on the part of an attorney to give evidence when acting as advocate in the cause." In the report in the Bail Court Reports, he is said to have added, "This principle was acted on by the late Lord Tenterden, and I think it is sound." It will be observed that both these cases are the decisions of single judges, whose language falls short of laying down as a universal rule that, under no circumstances whatever, can counsel or an advocate be examined as a witness in a cause in which he is acting as such. It would, we apprehend, be difficult to support such a position; for there are cases in which the advocate might be the sole repository of the most important evidence. And it is no answer to this to say, that if aware of that fact he ought to decline to act professionally in the cause; for it not unfrequently happens, especially in criminal courts, that facts bearing most powerfully on the issue appear relevant in the course of a trial, though at its commencement it was impossible to foresee their relevancy. Suppose an indictment for a murder at A., to which the defence set up is a false alibi, — *e. g.*, that the accused was on that day and hour in a certain room in a certain house at B.; the counsel for the prosecution may have been alone in that room at that day and hour, and may know of his own knowledge that the accused was *not* then there; could his evidence be excluded?

These cases, however, of *Stones* v. *Byron* and *Dunn* v. *Packwood*, taken at the strongest, only show that an advocate is not a competent witness *for* his client, and leave untouched the question whether he is competent for the other side. Now it would be very dangerous to allow a party who knows that important, perhaps the only important, evidence against him will be given by an advocate, to shut

(*s*) 11 Jur. 242; 1 B. C. R. 312; s. c. nom. *Deane* v. *Packwood*, 4 D. & L. 395, n. (*b*); Hil. 1847.

that person's mouth by retaining him as his counsel; and if it be said that no counsel should accept the retainer under such circumstances, the answer is, that the question is not what the honour of the bar exacts, but what the law will allow. Professional privileges may be abused, and the supposed impeccability of every member of a numerous profession is an unsafe basis of legislation. Besides, it may be as well to remark, that under the old law, previous to the 6 & 7 Vict. c. 85, when an interest in the event of the suit was ground for the rejection of a witness, the rule did not apply to a case where the interest was *fraudulently* acquired in order to create incompetency (*t*).

§ 185. Nor is this matter so barren of authority as appears to have been assumed in the two cases decided in the Bail Court. In Bacon's Abridgment, Evidence, A. 3, it is said, "The inconveniency would be very great, if a counsel were not at all to be made use of as a witness; for by this means every such person's evidence may be taken off by giving him a fee." In *Cuts* v. *Pickering* (*u*) the court laid down *obiter* that with respect to competency to bear testimony the same law was of an attorney or counsel. And Sir John Hawles, in his observations on the State Trials in 1 Jac. II. (*x*), tells us, "Every man knows that a counsel has been enforced to give evidence against his client, provided it be not of a secret communication to him by his client." The same is stated in the book called "Trials per Pais" (*y*); and in the cases of *Waldron* v. *Ward* (*z*) and *Sparke* v. *Middleton* (*a*), counsel who had been employed by a party were examined. There can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible. But we apprehend that a judge has no right *in point of law* to reject him; although, if the court above were of opinion that, under all the circumstances, any practical mischief had resulted from the reception of such a witness, they might, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.

§ 186. These views are confirmed by the case of *Cobbett* v. *Hudson* (*b*). After the 14 & 15 Vict. c. 99, had allowed parties to a suit to be witnesses, it became clear that — inasmuch as all persons who sue or defend in a court of justice may, if so disposed, conduct their own causes without legal assistance — the question whether a person

(*t*) Ph. & Am. 144.
(*u*) 1 Ventr. 197.
(*x*) 11 How. St. Tr. 459.
(*y*) Page 385.
(*z*) Sty. 449.
(*a*) 1 Keb. 505. See also Mar. 83, pl. 136.
(*b*) 1 Ell. & Bl. 11.

who so conducts his own cause can also be a witness in it must soon present itself for decision; and the point at length arose in the case referred to. At the trial before Lord Campbell, C. J., the plaintiff, who sued in formâ pauperis, conducted his cause in person. The Lord Chief Justice told him that if he addressed the jury as an advocate, he could not be permitted to give evidence as a witness. The plaintiff elected to act as advocate, and not as a witness. A verdict having been given for the defendant, a rule was obtained for a new trial, on the ground that the above ruling was erroneous. This rule was argued before Lord Campbell, C. J., Coleridge, Wightman, and Erle, JJ.; and after time taken to consider, the following judgment was delivered by Lord Campbell: "We are of opinion that the rule for a new trial should be made absolute, on the ground that the plaintiff was improperly told that he could not be permitted to address the jury as his own advocate, without agreeing to waive his right to be examined as a witness in his own behalf. We are fully aware of the inconvenient consequences which must follow, from a party to a suit being alternately during the trial advocate and witness; and we express our strong disapprobation of such a practice. But we cannot say that the judge at nisi prius has at present sufficient authority to prevent it. Before the recent statute (14 & 15 Vict. c. 99), the party had a right to conduct his own cause in person, although he could not be his own witness; and by that statute (sect. 2) he is rendered 'competent and compellable to give evidence' as a witness, without any abridgment of his former right to act as his own advocate. We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different judges may form different opinions. It was stated at the trial that verdicts had several times been set aside, on the sole ground that the same person had been permitted to act as advocate and to be examined as a witness; but when the cases alluded to are examined, it will be found that the rigid rule contended for is not laid down in them. In *Stones* v. *Byron*, 4 D. & L. 493, upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff, and then been examined as a witness for him, Patteson, J., observed: 'I must say that I do not think that such a course of proceeding is proper, or consistent with the due administration of justice. It seems to me, therefore, that his evidence ought not to have been received, and having been received, that there ought to be a new trial.' But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the under-sheriff who presided was unduly influenced, appears to have been a ground of

the decision. In *Deane* v. *Packwood*, 4 D. & L. 395, note *b* (very shortly reported in a note to *Stones* v. *Byron*, 4 D. & L. 393), which was likewise a trial before the sheriff, the plaintiff's attorney, after addressing the jury as advocate, was examined as a witness; and Erle, J., granting a new trial on this ground, but without laying down a general rule on the subject, or professing to extend the authority of *Stones* v. *Byron*. In *R.* v. *Brice*, 2 B. & A. 606, it was laid down that, on the trial of an indictment for perjury, the prosecutor shall not be admitted to address the jury; the court observing, 'the prosecutor may be and generally is a witness; and it is very unfit that he should be permitted to state, not upon oath, facts to the jury which he is afterwards to state to them on his oath.' But there the king was to be considered the party; and the private prosecutor had no right to address the jury, even if he waived his right to be examined as a witness. It was said, at the trial of this cause, that since the late Evidence Act (14 & 15 Vict. c. 99) passed, it had been decided, both before the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, that a party cannot be permitted to act as his own advocate and to be examined as his own witness; but after diligent inquiry, no such decision can be discovered. The validity of the rule contended for, is placed on the authority of the judge at nisi prius, to regulate the procedure in a way that may be most conducive to the investigation of truth; and the instance was referred to of an order for the witnesses to leave the court, with an intimation that any witness who remains in court, or returns into court before he is called, shall not be examined. But the judge must be governed by established practice and the general rules of law. With respect to ordering the witnesses out of court, although this is clearly within the power of the judge, and he may fine a witness for disobeying this order, the better opinion seems to have been that his power is limited to the infliction of the fine, and that he cannot lawfully refuse to permit the examination of the witness; see *Cook* v. *Nethercote*, 6 C. & P. 741; *Thomas* v. *David*, 7 *Id.* 350; *R.* v. *Colley*, 1 Moo. & Mal. 329. We may hope that, without any positive rule against a party addressing the jury, and being examined as a witness on oath on his own behalf, a practice so objectionable is not likely to spring up; for it is not only contrary to good taste and good feeling, but, as it must be revolting to the minds of the jury, it will generally be injurious to those who attempt it. In such a case as the present there is not the smallest colour for resorting to it; for the plaintiff, suing in formâ pauperis, had counsel assigned to him, who must be supposed to have been ready to support at the trial the certificate he had given, that the plaintiff had a good cause of action; and an offer was freely made to the plaintiff to

postpone the trial till the attendance of this gentleman could be procured. If the practice does gain ground to a degree seriously injurious to the due administration of justice, the legislature may interfere, or the judges, under the authority vested in them, may make a general order whereby it may be prevented in future. But, as the law now stands, we think the judge at nisi prius exceeded his authority, in refusing to allow the plaintiff to be examined as a witness on oath after addressing the jury as an advocate; and that upon a new trial he must be permitted to do both if he shall be so inclined." The rule for a new trial was accordingly made absolute.

§ 187. Next, as to the case of jurors. It is fully settled that a juryman may be a witness for either of the parties to a cause which he is trying (*c*)[1]. And it is essential that this should be so, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony. But here an important distinction must be borne in mind; viz., the difference between general information and particular personal knowledge. A writer on this subject states the rule thus (*d*): "It is now perfectly settled that a juror cannot give a verdict founded on his own private knowledge; for it could not be known whether the verdict was according to or against the evidence; it is very possible that the private grounds of belief might not amount to legal evidence.[2] And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts, it will be a ground of motion for a new trial." This distinction is well illustrated by the following cases. In *R.* v. *Rosser* (*e*), the accused was indicted for stealing, in a dwelling-house, a watch and seals, alleged to be of the value of 7*l.*; and a witness for the prose-

(*c*) 3 Blackst. Comm. 375; Trials per Pais, 384; 2 Hawk. P. C. c. 46, s. 17; 1 Lill. Pract. Reg. 552; 2 *Id.* 126; *R.* v. *Reading*, 7 How. St. Tr. 267; *R.* v. *Heath*, 18 *Id.* 123; *Bennet* v. *The Hundred of Hartford*, Sty. 233; *Fitzjames* v. *Moys*, 1 Sid. 133; *Anon.*, 1 Salk. 405; *R.* v. *Rosser*, 7 C. & P. 648; *Manley* v. *Shaw*, Car. & M. 361.

(*d*) 1 Stark. Ev. 542, 3rd Ed.; *Id.* 816, 4th Ed. See acc. 1 Lill. Pract. Reg. 552; 2 *Id.* 126; 6 How. St Tr. 1012 (n.); 18 *Id.* 123.

(*e*) 7 C. & P. 648.

[1] The law is the same in America. Dunbar *v.* Parks, 2 Tyler, 217; State *v.* Powell, 2 Halsted (N. J.), L. 244; Howser *v.* Com., 51 Pa. St. 332; McKain *v.* Love, 2 Hill (S. C.), 506; Foster's Will, 34 Mich. 21, acc.

[2] So, also, in America, Schmidt *v.* N. Y. Mut. Fire Ins. Co., 1 Gray, 529, 535, acc.

cution having sworn that the property in his opinion was worth that sum, the jury, after the summing-up, inquired if they were at liberty to put a value on the property themselves. To this Vaughan, J., answered, "If you see any reason to doubt the evidence on the subject, you are at liberty to do so. Any knowledge you may have on the subject you may use. Some of you may perhaps be in the trade." And Parke, B., added, "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn." And in *Manley* v. *Shaw* (*f*), which was an action against the acceptor of a bill of exchange, after the handwriting of the defendant had been proved, one of the jury, on looking at the bill, said that the stamp was a forgery, and stated to the court that several respectable houses had been found in possession of forged stamps to a great amount: on which Tindal, C. J., said, "The gentleman of the jury who says that the stamp is a forgery should be sworn as a witness, to give evidence to his brother jurors before they can act upon his opinion;" and told the juryman that, if he thought proper, he might be sworn and examined as a witness to prove the forgery. The juryman declining this, and there being no other evidence, the judge directed a verdict for the plaintiff.

§ 188. Lastly, with respect to judges.[1] Notwithstanding the language attributed to Gascoigne, C. J., on this subject (*g*), it is clearly no objection to the competency of a witness that he is named as a judge in the commission under which the court is sitting (*h*). But a distinction has been taken with respect to the judge who is actually trying the cause (*i*); and it may be observed that on the trial of one of the regicides in 1660, when two of the members of the commission came down from the bench to give evidence, they did not return to it until after that trial was concluded (*k*); this, however, may have been matter of taste and feeling. When a nobleman is tried by the House of Lords, any of the peers is a competent witness (*l*); but then, on such occasions, each peer sits in the capacity both of judge and juryman. The objection, if it be one, to the competency of the

(*f*) Car. & M. 361.

(*g*) P. 7 H. IV. 41 A. and see Plowd. 83.

(*h*) 2 Hawk. P. C. c. 46, s. 17; Bac. Abr. Ev. (A. 2); *R.* v. *Hacker*, J. Kely. 12; Observations of Sir J. Hawles, 11 How. St. Tr. 459.

(*i*) Tayl. Ev. § 1244; 1 Greenl. Ev. § 364, 7th Ed.

(*k*) *R.* v. *Hacker*, J. Kely. 12.

(*l*) *Lord Stafford's case*, 7 How. St. Tr. 1384, 1458, 1552; *Earl of Macclesfield's case*, 16 *Id.* 1252, 1391.

[1] For some consideration of the American cases, see 1 Greenl. Ev. §§ 166, 249, 364.

judge who presides at the trial rests, not on the ground of his having to form a judgment on the case, — this argument would exclude the juryman, — but on one analogous to that urged against the competency of counsel; viz., the difficulty which the jury would have in discriminating between his testimony, and his direction to them on matters of law, or his comments on the evidence given by other witnesses; to which the same answer presents itself; namely, that the presiding judge may be the sole depository of important evidence, the relevancy of which to the issue raised cannot even be suspected until the case is gone into. Besides, the litigant parties have no voice whatever in the selection of the judge, and cannot challenge him, either peremptorily or for cause. Sir John Hawles, in the observations to which we have already referred, says (*m*): "Every man knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after reassume his authority, and is afterwards a judge of the jury's verdict." There can be no doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.

As for a judge who is neither trying the cause nor named in the commission, it has been said to be doubtful whether he is compellable to testify anything which came to his knowledge as judge (*n*), but he seems to be a competent witness, although this also has been doubted. It is hardly necessary to add that with regard to things not coming to his knowledge as judge, a judge is as competent and compellable a witness as any other person. Within the last few years, at least five judges of the High Court (*o*) have appeared as witnesses.

It is established beyond doubt that an arbitrator may be called as a witness in an action to enforce his award, and may be asked what

(*m*) 11 How. St. Tr. 459.

(*n*) Steph. Dig., art. 111, citing *R.* v. *Gazard*, 8 C. & P. 595. In this case Patteson, J., advised a grand jury not to examine a chairman of Quarter Sessions as to what a person testified in a trial in his court. "With respect to those who fill the office of judges, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment, and as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent, their being examined." Per Cleasby, B., in *Buccleuch* (*Duke of*) v. *Metropolitan Board of Works*, *infrà*. See also *R.* v. *Harvey*, 8 Cox, C. C. at p. 103, where Byles, J., said, "that if he were to be subpœnaed to produce his notes, he would refuse to appear, but that the same objection was not applicable to the judges of the inferior courts." The public inconvenience of withdrawing a judge from his own court would seem to be a strong argument against compelling him to give *oral* testimony. The case, if civil, would seem to be one for the application of Order XXXVII. Rule 1, which allows examination by interrogatories of a witness whose attendance in court ought for some sufficient reason to be dispensed with.

(*o*) Coleridge, C. J., when Lord Chief Justice of England, before the committing justices in the Furneaux Frauds in 1881: Jessel, M. R., Denman, J., Pollock, B., and Lopes, J.

passed before him, and what matters were presented to him for consideration, but not what passed in his own mind when exercising his discretionary powers as to the matters submitted to him (*p*).

(*p*) *Buccleuch* (*Duke of*) v. *Metropolitan Board of Works*, L. R., 5 H. L. 418.

AMERICAN NOTES.

(§ 134) INCOMPETENT WITNESSES. — The sole persons at present disqualified as witnesses are those so disqualified by, —

(*a*) *Defective Understanding*, — natural or superinduced. Evans *v.* Hettich, 7 Wheat. 453; Livingstone *v.* Kiersted, 10 Johns. 362; Robinson *v.* Dana, 16 Vt. 474. (1) Thus, a person may be disqualified as a witness by reason of extreme youth, if, in the opinion of the judge, he is thereby prevented from understandingly and conscientiously answering the questions asked, or recollecting the transaction to which such questions relate. Flanagin *v.* State, 25 Ark. 92; Carter *v.* State, 63 Ala. 52; People *v.* McNair, 21 Wend. 608; Com. *v.* Hutchinson, 10 Mass. 225; State *v.* Whittier, 21 Me. 341, 347. For cases where young children were held competent as being of sufficient mental and moral capacity, see Vincent *v.* State, 3 Heisk. 120; Com. *v.* Carey, 2 Brews. (Pa.) 404; Draper *v.* Draper, 68 Ill. 17; Blackwell *v.* State, 11 Ind. 196; Gardner *v.* Kellogg, 23 Minn. 463; State *v.* Edwards, 79 N. C. 648; Warner *v.* State, 25 Ark. 447; Davidson *v.* State, 39 Tex. 129; State *v.* Whittier, 21 Me. 341; Johnson *v.* State, 61 Ga. 35; Wade *v.* State, 50 Ala. 164; Com. *v.* Lynes, 142 Mass. 577; R. *v.* Bérubé, Q. B., 3 L. C. R. 212; McGuire *v.* People, 44 Mich. 286. (2) So one suffering from mental disease or delusion is incompetent, if, in the opinion of the judge, the disease or delusion is such as seriously to affect the evidence of the witness on the points relevant to the issue which such evidence covers. Holcomb *v.* Holcomb, 28 Conn. 177; Coleman *v.* Com., 25 Gratt. 865; Livingstone *v.* Kiersted, 10 Johns. 362; Kendall *v.* May, 10 All. 59; Campbell *v.* State, 23 Ala. 44. See also Sarbach *v.* Jones, 20 Kans. 497, 500. (3) So of intoxication. State *v.* Underwood, 6 Ired. 96; Gould *v.* Crawford, 2 Barr, 89; Hartford *v.* Palmer, 16 Johns. 143; Gebhart *v.* Shindle, 15 S. & R. 235. See also McDowell *v.* Preston, 26 Ga. 528.

(*b*) *Policy of Law.* — Of the once complicated and sweeping rules respecting persons considered incompetent by policy of law, there are but few survivals. (1) Thus the old rule making a person adjudged guilty of an infamous crime — treason, felony, or the *crimen falsi* — incompetent as a witness, has been largely modified both by statute and judicial legislation. See Schuylkill *v.* Copley, 67 Pa. St. 386; Brown *v.* State, 18 Oh. St. 496; People *v.* Park, 41 N. Y. 21; Com. *v.* Keith, 8 Metc. 531; State *v.* Howard, 19 Kans. 507. But conviction of such crime may be shown to affect the credibility of the witness. Com. *v.* Gorham, 99 Mass. 420; Donohue *v.* People, 56 N. Y. 208; Dickinson *v.* Dustin, 21 Mich. 561; Glenn *v.* Core, 42 Ind. 60. (2) As to how far an atheist is incompetent to testify, conf. 1 Greenl. Ev. § 368, nn. 2 and 3; Com. *v.* Burke, 16 Gray, 33; People *v.* Copsey, 71 Cal. 548; St. *v.* Belton, 23 S. C. 185; Ewing *v.* Bailey, 36 Ill. App. 191; Bush *v.* Com., 80 Ky. 244; Donkle *v.* Kohn, 44 Ga. 266. At common law an atheist could not be a witness. Smith *v.* Coffin, 18 Me. 157; Norton *v.* Ladd, 4 N. H. 444; Arnold *v.* Arnold, 13 Vt. 362; Thurston *v.* Whitney, 2 Cush. 104; People *v.* McGarren, 17 Wend. 460. But belief in a future state of punishment is, it seems, not necessary at common law. It is considered sufficient if the witness speak under the sanction of anticipated punishment for perjury at the hands of some superhuman power. That the punishment is to be in the present life of the witness, is immaterial. U. S. *v.* Kennedy, 3 McLean, 175; Hunscom *v.* Hunscom, 15 Mass. 184; R. *v.* Pah-Mah-Gay, 20 Q. B. U. C. 195; People *v.* Matteson, 2 Cowen, 433; Brock *v.* Milligan, 10 Ohio, 121, 125; Blair *v.* Seaver, 26 Pa. St. 274. (3) So a judge before whom the cause is tried is not, it seems, competent as a witness, if he be the *sole* judge. 1 Greenl. Ev. §§ 166, 249, 364;

Dabney *v.* Mitchell, 66 Ala. 495; Morss *v.* Morss, 11 Barb. 510; Ross *v.* Buhler, 2 Martin, N. S. 312; People *v.* Miller, 2 Parker, C. R. 197. See, however, to the effect that judge of lower court may attend and produce his memoranda of evidence, Spalding *v.* Lowe, 56 Mich 366. Where one of several judges at a trial is taken as a witness, he should take no further part in the trial. 1 Greenl. Ev. § 364; People *v.* Dorhing, 59 N. Y. 374. But an attorney may be a witness. Potter *v.* Ware, 1 Cush. 519; Follansbee *v.* Walker, 72 Pa. St. 228; Morgan *v.* Roberts, 38 Ill. 65; State *v.* Cook, 23 La. An. 347; Abbott *v.* Striblen, 6 Ia. 191; State *v.* Woodside, 9 Ired. 496; Morrow *v.* Parkman, 14 Ala. 769; Grant's Succession, 14 La. An. 795. See, however, Quarles *v.* Waldron, 20 Ala. 217; Carrington *v.* Holabird, 17 Conn. 530. Although the practice is reprobated by the courts. Bank *v.* McElroy, 2 Pugs. (New Bruns.) 462; Davis *v.* Ins. Co., 39 Q. B. U. C. 452, 479. (4) By common law husband and wife are incompetent in each other's suits. Dwelly *v.* Dwelly, 46 Me. 377; Seargent *v.* Seward, 31 Vt. 509; Pringle *v.* Pringle, 59 Pa. St. 281; Rose *v.* Brown, 11 W. Va. 122; Taulman *v.* State, 37 Ind. 353; Barclay *v.* Waring, 58 Ga. 86; Haerle *v.* Kreihn, 65 Mo. 202. The necessity of the case has introduced an exception in cases of violence committed by the husband on the wife. People *v.* Fitzpatrick, 5 Parker, C. R. 26; Com. *v.* Murphy, 4 All. 491; State *v.* Neill, 6 Ala. 685. It is, however, essential to the application of the rule that there should be a valid existing marriage. Divoll *v.* Leadbetter, 4 Pick. 220; Flanagin *v.* State, 25 Ark. 92; People *v.* McCraney, 6 Parker, C. R. 49; State *v.* Patterson, 2 Ired. 346; Finney *v.* State, 3 Head, 544; State *v.* Johnson, 12 Minn. 476. But see Friel *v.* Wood, 1 Utah, 160. As to how far a husband and wife can *criminate* each other, see § 578, n. 1 (*d*), *infra*.

(*c*) *Interest.* — As to the general subject of incompetency from interest, and the rules which at present obtain in this country with regard to it, conf. Green *v.* United States, 9 Wall. 655; Hubbell's case, 4 Ct. Claims, 37; Mobile *v.* Jones, 42 Ala. 630; Giles *v.* Wright, 26 Ark 476; People *v.* McGungill, 41 Cal. 429; Rust *v.* Shackleford, 47 Ga. 538; Mitchinson *v.* Cross, 58 Ill. 366; Fitzgerald *v.* Cox, 39 Ind. 84; Keech *v.* Cowles, 34 Ia. 259; McKean *v.* Massey, 9 Kans. 600; Downes *v.* Md. R. R. Co., 37 Md. 100; Brooks *v.* Tarbell, 103 Mass. 496; Moulton *v.* Mason, 21 Mich. 364; State *v.* Dee, 14 Minn. 35; Reinhardt *v.* Evans, 48 Miss. 230; Gavin *v.* Williams, 50 Mo. 206; Ballou *v.* Tilton, 52 N. H. 605; Walker *v.* Hill, 21 N. J. Eq. 191; Gilmer *v.* McVairy, 69 N. C. 335; Hubbell *v.* Hubbell, 22 Oh. St. 208; McClelland *v.* West, 70 Pa. St. 183; Guery *v.* Kinsler, 3 S. C. 423; Re Foster, 44 Vt. 570; Ex parte Simpson, 2 Pugs. (New Bruns.) 142; Potter *v.* Menasha, 30 Wis. 492. The sole survival of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest may be said to be the rule which makes a legatee (or the husband or wife of such legatee) incompetent to act as an attesting witness to the will containing such legacy. Sparhawk *v.* Sparhawk, 10 Allen, 155; Sullivan *v.* Sullivan, 106 Mass. 474. Competency is a question for the court. State *v.* Whittier, 21 Me. 341; Com. *v.* Burke, 16 Gray, 33; Draper *v.* Draper, 68 Ill. 17; Peterson *v.* State, 47 Ga. 524; State *v.* Scanlan, 58 Mo. 204. But see Hartford Ins. Co. *v.* Reynolds, 36 Mich. 502.

CHAPTER III.

GROUNDS OF SUSPICION OF TESTIMONY.

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§ 189. "EXCEPTIONS to the credit of the witness," says Sir Matthew Hale (*a*), "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility, of the witness and his testimony; and these exceptions are of that great variety and multiplicity that they cannot easily be reduced under rules or instances." They have been immensely increased in consequence of the statutes 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83; as interest in the event of the cause and infamy of character, which before those statutes constituted objections to the *competency* of a witness, may now be urged to the jury as objections to his *credit* (*b*).

§ 190. "Witnesses," says Sir Edward Coke (*c*), "ought to come to be deposed untaught, and without instruction, and should wish the victory to the party that right hath, and that justice should be administered; and should say from his heart, 'Non sum doctus, nec instructus, nec curo de victoriâ, modo ministretur justitia'" (*d*). This truly happy frame of mind is, however, not always met with; for there is no possible interest or motive which may not, under some state of circumstances, taint the testimony of man with falsehood or misrepresentation. Much of course depends on the physical constitution, and the character, moral and religious, of the individual. Some persons seem almost above any degree of temptation; others, who resist long, succumb at last; others yield on slight pressure; and some scarcely wait to be tempted. To enumerate these interests

(*a*) 2 Hale, P. C. 276, 277.

(*b*) On the value of human testimony in general, see Introduction, pt. 1.

(*c*) 4 Inst. 279.

(*d*) See acc. Devot. Inst. Canon. lib. 3, tit. 9, § xvii. 5th Ed.

or motives would be to enumerate the springs of human action (*e*); but the following are among the principal.

§ 191. First, then, of *pecuniary* interest, as being the most obvious. This was formerly a ground of incompetency (*f*); and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration. The temptation which poverty affords to perjury needs little comment.

> ". . . . . Jures licet et Samothracum
> Et nostrorum aras ; contemnere fulmina pauper
> Creditur atque deos, dîs ignoscentibus ipsis" (*g*).

> "En grande pauvreté n'y a pas grande loyauté" (*h*).

Expressions like these, however, are, if understood literally, libels on human nature; and the rich and great are subject to temptations of their own (*i*).

§ 192. Secondly, a powerful source of false testimony is to be found in the relations between the sexes. Previous to the 16 & 17 Vict. c. 83, husband and wife were incompetent witnesses for or against each other, in most civil, as they still are in most criminal, cases (*k*), — an exclusion based, not so much on supposed affection between them, as on an artificial unity of person established by the policy of the law. But the existence of any other relation of this kind — such as that of a man with his kept mistress, &c. — only goes to the credit of a witness. Whether a man's wife or his kept mistress is most likely to bear false testimony in his favour depends on circumstances. In the one case there is, by law, an almost indissoluble unity of person, accompanied most usually by a unity of interest, but still where affection may or may not exist; in the other, the relation probably originated in at least some degree of affection on the part of the man; but then he may at any moment put an end to it, which in many instances would deprive a woman of the means of subsistence, whose reputation has been forfeited.

§ 193. Thirdly, the interest arising out of other domestic and social relations. This may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency (*l*); and friendship or enmity with one of

(*e*) See further on this subject, 5 Benth. Jud. Ev. bk. 10, c. 2 *et seq.*

(*f*) *Suprà*, cc. 2.

(*g*) Juvenal, Sat. 3, vv. 144 *et seq.*

(*h*) Bonnier, Traité des Preuves, §§ 190 and 320.

(*i*) *Infrà.*

(*k*) See the preceding chapter.

(*l*) Dig. lib. 22, tit. 5, ll. 4 and 5; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 3, § x.

the litigant parties may justly cause evidence to be looked on with suspicion (*m*). Nor do even these supply the most efficient motives to falsehood. A parent in his family, a military, ecclesiastical, official, or feudal superior may often, without exposing himself to danger, or even shame, inflict mischief almost boundless on those who are subject to his authority. "Idonei non videntur esse testes, quibus imperari potest, ut testes fiant," said the Roman law (*n*). Among us, however, this only goes to the credit of the witness.

§ 194. Fourthly. Perjury is very often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.

§ 195. Fifthly. The last source of bias which we shall notice is the feeling of interest in or affection for others. A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own (*o*). To this head belong those cases where mendacious evidence is given through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like. This is very frequently found in witnesses from the higher walks of society, and it is not easy for a hostile advocate to deal with such witnesses, — for although it is evident they are misleading the tribunal, their station and demeanour alike render it unsafe to speak of them as perjured (*p*).

(*m*) Dig. lib. 22, tit. 5, l. 3; lib. 48, tit. 18, l. 1, §§ 24 & 25; Domat, *in loc. cit.* §§ xi. and xii.

(*n*) Dig. lib. 22, tit. 5, l. 6.

(*o*) Introd. pt. 1, § 20.

(*p*) "Si deficietur numero" (scil. testium) "pars diversa, paucitatem; si abundabit, conspirationem; si humiles producet, vilitatem; si potentes, gratiam oportebit incessere." Quintil. Inst. Orat. lib. 5, c. 7.

PART II.

REAL EVIDENCE.

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§ 196. "REAL EVIDENCE"[1] — the evidentia rei vel facti of the civilians (*a*) — means all evidence of which any object belonging to the class of *things* is the source; *persons* also being included in respect of such properties as belong to them in common with things (*b*). Thus where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not (*c*); and if the mayhem was obvious, such as striking off an arm, &c., the proof was both real and direct. But in most instances real evidence is only

(*a*) Mascard. de Prob. quæst. 8; Calv. Lexic. Jurid.; and the judgment of Lord Stowell in *Evans* v. *Evans*, 1 Hagg. C. R. 105.

(*b*) 3 Benth. Jud. Ev. 26; 1 *Id.* 53.

(*c*) 28 Ass. pl. 5; 22 *Id.* pl. 99; 37 *Id.* pl. 9. See also Mascardus de Prob. quæst. 8, n. 10.

[1] For a collation of the American authorities, see p. 196.

circumstantial in its nature (*d*); *i. e.*, evidence from which the existence of the principal fact is inferred by a process of reasoning.

§ 197. Real evidence is either *immediate* or *reported* (*e*). *Immediate* real evidence is, where the thing which is the source of the evidence is present to the senses of the tribunal (*f*). This is of all proof the most satisfactory and convincing, — "Cum adsunt testimonia rerum, quid opus est verbis" (*g*), — but, as already stated, it is rarely available, at least with respect to principal facts. And so sensible is the law of its transcendent value that in some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, it is an established rule that a prisoner shall not be convicted of murder, "unless the fact were proved to be done, or at least the body be found dead" (*h*). So a coroner's inquest, to ascertain the cause of the death of a person who has died suddenly, must be held super visum corporis (*i*). So, when a fine was levied, the parties were required by the ancient statute 18 Edw. 1, st. 4, Modus levandi fines, to appear personally before the justices, in order that it might be discerned by them if they were of full age and good memory, &c. (*k*). And the same seems to hold in the case of a recognisance (*l*); which is always expressed to be entered into on the personal appearance of the party before the justice who takes it (*m*). On this principle, in a great degree, rests the just and sound rule of English judicature, that the evidence of witnesses must in general be given by them personally in open court, — the real evidence afforded by their demeanour being one of the most powerful securities against perjury and fraud. There are likewise instances where the production of real evidence is exacted by practice. Thus on an indictment for larceny, if the stolen prop-

(*d*) See 1 Benth. Jud. Ev. 55; 3 *Id.* 33.

(*e*) 3 Benth. Jud. Ev. 33.

(*f*) Where the production of real evidence in open court would be indecent, the jury may inspect it in private; as was done in the case before Lord Hale, where a man successfully defended himself against a charge of rape, by showing that he had a frightful rupture. 1 Hale, P. C. 635, 636. See also Bonnier, Traité des Preuves, § 77.

(*g*) 2 Bulst. 53. On this subject Mascardus (de Prob. quæst. 8, n. 20), and Bonnier (Traité des Preuves, § 51) quote the well-known lines from the Ars Poetica of Horace —

"Segniùs irritant animos demissa per aurem,
Quàm quæ sunt oculis subjecta fidelibus."

(*h*) 2 Hale, P. C. 290. As to what is sufficient to prove "the fact" "to be done," so as to dispense with the necessity of proving that the dead body has been found, see *R.* v. *Hindmarsh*, 2 Leach, 569.

(*i*) Coroner's Act, 1887, s 4, re-enacting 21 Edw. 4, 70, 71; *Reg.* v. *Ferrand*, 3 B. & Ald. 260.

(*k*) For this reason a fine levied by an idiot, lunatic, &c. was good, for the law presumed that the judge would not allow the party to levy it unless he were of sound mind. See *Beverley's case*, 4 Co. 123 b; *Mansfield's case*, 12 *Id.* 124; and the argument in *Molton* v. *Camroux*, 2 Exch. 487.

(*l*) *Beverley's case*, 4 Co. 124 a. Semble per Parke, B., in *Molton* v. *Camroux*, 2 Exch. 487, 493.

(*m*) See the precedents in Dalton's Country Justice, Burn's Justice of the Peace, &c.

erty has been found, the court usually insists on its being produced before the jury; although, when the goods stolen are of a perishable nature, this is of course frequently impossible; neither would it be required when likely to be inconvenient or offensive, as where flesh stolen is in an advanced state of decomposition, &c. But real evidence is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models (*n*), or by what is technically termed a "view;" *i. e.*, a personal inspection by some of the jury of the *locus in quo*, — a proceeding allowed in certain cases by the common law (*o*), in criminal (*p*) as well as in civil cases, and much extended by the statutes 4 Anne, c. 16, s. 8; 6 Geo. 4, c. 50, s. 23; 15 & 16 Vict. c. 76, s. 114, and 17 & 18 Vict. c. 125, s. 58; which authorised the court or a judge, on the application of either party to an action, to grant a rule or order for the inspection by the jury or by himself or by his witnesses, of any real or personal property the inspection of which might be material to the proper determination of the question in dispute. And now, by "The Rules of the Supreme Court" (*q*), it is provided, that the court or a judge may, upon the application of any party to a cause or matter, and upon such terms as may seem just, make any order for the detention, preservation, or inspection of any property or thing being the subject of such cause or matter, or as to which any question may arise therein; and for all or any of the purposes aforesaid, may authorise any persons to enter upon any land or building in the possession of any party to such cause or matter or any samples to be taken, or experiment tried, which may be necessary or expedient, for the purpose of obtaining full information or evidence.

§ 198. *Reported* real evidence is, where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents (*r*). This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence. "To the reporting witness indeed, if his report be true, it was so much immediate, so much pure real evidence; but to the judge it is but reported real evidence. The distinction is far from being a purely speculative one; practice requires to be directed by it. Reported real evidence is analogous to hearsay evidence, and labours more or less under the infirmities which attach to that modification of per-

(*n*) It is the same in France. See Bonnier, Traité des Preuves, § 55.

(*o*) F. N. B. 123 C., 128 B., 184 F.; 2 Salk. 665; 2 Wms. Saund. 44 a, n. 4.

(*p*) *Reg.* v. *Martin*, 41 L. J., M. C. 113.

(*q*) R. S. C., Ord. r. 3.

(*r*) 3 Benth. Jud. Ev. 33.

sonal evidence, compounded of circumstantial evidence and direct, — of real evidence and ordinary personal evidence (evidence given in the way of discourse); it unites the infirmities of both. The lights afforded, or said to have been afforded, by the real evidence, are liable to be weakened in intensity, and altered in colour, by the medium through which it is transmitted" (*s*).

§ 199. Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise are sometimes *necessary* and sometimes only *presumptive*. And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and infirmative hypotheses in those proceedings. By "*infirmative* fact" or "hypothesis" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render *infirm* the probative force of some other fact which is evidentiary of it (*t*).

§ 200. In the case of *necessary* inferences, properly so called, there can be no infirmative facts or hypotheses. As instances, — where a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated by the bloody mark of a *left* hand visible on her *left* arm (*u*). And where a man was found killed by a bullet, with a discharged pistol lying beside him, the hypothesis of his having committed suicide with that pistol was negatived by proof that the bullet which caused his death was too large to fit it (*x*).

§ 201. Cases of this kind are, however, of rare occurrence, and when they do present themselves the facts speak too plainly to need comment. In the vast majority of instances, the inference to which a piece of circumstantial real evidence gives rise, is only *probable* or *presumptive*. On charges of homicide, for instance, the nature of the weapon with which the fatal blow was given is of the utmost importance in determining whether malice existed or ought to be presumed; on charges of rape, the clothes worn by the female at the time of the alleged outrage, torn and stained, or untorn and unstained, as the case may be, afford a strong presumption for or

(*s*) 3 Benth. Jud. Ev. 34.

(*t*) See 3 Benth. Jud. Ev. 14. "Socrates, who, professing to affirm nothing, but to *infirm* that which was affirmed by another, hath exactly expressed all the forms of objection, fallacy, and redargution": Bac. Adv. Learn. bk. 2.

(*u*) Case of *Norkott and others*, 10 Harg. St. Tr. App. No. 2, p. 29.

(*x*) Theory of Pres. Proof, App. case 2; Wills, Circumst. Ev 80, 3rd Ed. See other instances in Beck's Med. Jurispr. p. 591, 7th Ed.

against the charge. But physical coincidences and dissimilarities, often of a most singular kind, frequently lead to the discovery of the perpetrators of offences, or establish the innocence of parties wrongly accused. Several instances of the former are given in Starkie on Evidence (*y*). Thus, in a case of burglary, — where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt, — part of the blade was left sticking in the window-frame, and a broken knife the fragment of which corresponded with that in the frame was found in the pocket of the prisoner. So where a man was found killed by a pistol-shot, and the wadding in the wound consisted of part of a ballad, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches was found to correspond with an impression made in the soil close to the place where the murdered body lay. In a case of robbery, the prosecutor, when attacked, struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner. Mascardus also relates an instance where an enclosed ground set with fruit trees was broken into by night, and several fruits eaten, the rinds and fragments of some of which were found lying about. On examining these, it appeared that they had been bitten by a person who had lost two front teeth; and this caused suspicion to fall on a man in the neighbourhood who had lost two front teeth, and who, on being taxed with the theft, confessed his guilt (*z*). In some cases, also, the fact of the accused being left-handed becomes an adminiculum of evidence against him; *i. e.*, when surrounding circumstances show that the offence must have been perpetrated by a left-handed person (*a*). Few things have led to the detection of more forgeries than the Anno Domini water-mark on paper; and in one old case a criminal design was detected by a letter purporting to have come from Venice being written on paper made in England (*b*).

Strong, however, as coincidences and dissimilarities of this nature undoubtedly are, we must be careful not to attribute to them, when standing alone, a conclusive effect in all cases. Just let it be remembered that the men who were found in possession of the broken knife and the fragment of the ballad (the latter especially) might have picked them up where they had been thrown by the real criminals; that the person the print of whose knee was visible on the soil near the murdered corpse might have been a passer-by who

(*y*) 1 Stark. Ev. 562, 3rd Ed.; 844, 4th Ed.

(*z*) Mascard. de Prob. quæst. 8, n. 28.

(*a*) See the case of *William Richardson*, Appendix, No. I.; and *Patch's case*, Beck, Med. Jurispr. 583, 7th Ed.

(*b*) Moore, 817.

knelt down to see if life were really extinct, or to render assistance to the sufferer; that the having lost front teeth, or being left-handed, are not very uncommon, add to which, that some persons are what is called "ambi-dextrous," — *i. e.*, can use both hands with equal facility (*c*); that the Anno Domini water-mark on paper is by no means infallible, the year being often anticipated by the manufacturer (*d*); that, in the present age of the world at least, a person writing at Venice on a sheet of paper brought or imported from England, is scarcely improbable; and that even the impression made on the face by the key might have been caused by a blow from the same or a similar key at some other time (*e*), or might possibly be a natural mark. An excellent instance of how closely the propensity to run after coincidences ought to be watched, is presented by the case of one Fitter, who was indicted at the Warwick assizes of 1834 for the murder of a female. He was a shoemaker; and his leathern apron having on it several circular marks, made by paring away superficial pieces, it was supposed that they had been removed as containing spots of blood; whereas it was satisfactorily proved in his defence that he had cut them off for plasters for a neighbour (*f*).

It is when taken in connection with other evidence that physical coincidences and dissimilarities are chiefly valuable; and then they certainly press with fearful weight on a criminal. But if their presence is powerful for conviction, their absence is at least equally powerful for exculpation. Sir Matthew Hale relates a remarkable instance of a man who rebutted a charge of rape by showing that he laboured under a frightful rupture which rendered sexual intercourse almost, if not absolutely impossible (*g*). This is, however, an old case; and should a similar one now occur, the perfection which the manufacture of trusses has attained in modern times would be an infirmative circumstance not to be overlooked.

§ 202. The infirmative hypotheses affecting real evidence, however, present a subject of too much importance to be dismissed with a cursory notice. Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to *accident, forgery, or the lawful action of the accused.* Here it must not be forgotten that sometimes the most innocent men cannot explain, or give any account whatever, of facts which seem to criminate them; and the experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapped in mystery. 1.° Accident. The appearance of

(*c*) Tayl. Med. Jurisp. 230, 3rd Ed.
(*d*) Wills, Circ. Ev. 29 and 114, 3rd Ed.
(*e*) Goodeve, Evid. 29.
(*f*) Wills, Circ. Ev. 128, 3rd Ed.
(*g*) 1 Hale, P. C. 635, 636.

blood on the clothes of an accused or suspected person may be explained by his having, in the dark, come in contact with a bleeding body (*h*). Under this head come those cases where the appearance is the result of irresponsible agency; as where the act has been done by a party in a state of somnambulism (*i*); or as in the case of the unfortunate person in France who was executed as a thief, on the strength of a number of articles of missing silver having been found in a place to which he alone had access, and which were afterwards discovered to have been deposited there by a magpie (*j*).

§ 203. 2.° There is no subject in the whole range of judicial proofs which demands more anxious attention than the forgery of real evidence. It is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely (*k*). The presumption of guilt afforded by the detection of a forgery of real evidence is a different subject, and is based on the maxim, "Omnia præsumuntur contrà spoliatorem" (*l*), — its weight, as an infirmative hypothesis respecting real evidence in general, being all that comes in question at present.

§ 204. Forgery of real evidence may have its origin in any of the following causes: 1. Self-exculpation. 2. The malicious intention of injuring the accused, or others. 3. Sport, or with the view of effecting some moral end.

§ 205. 1. Self-exculpative forgery of real evidence. An excellent instance of the danger to be apprehended from this source is given by Sir Matthew Hale, in a passage which is very frequently quoted.

(*h*) See the case of *Jonathan Bradford*, Theory of Pres. Proof, Appendix, case 7. In Chambers's Edinburgh Journal also, for 11th March, 1837, there is a case where part of the evidence against a man charged with murder consisted in his night-dress having been found stained with blood, — a fact which he declared his inability to account for; and which was afterwards discovered to have been occasioned by his bedfellow having a bleeding wound, of which the prisoner was not aware.

(*i*) Cases of this nature have occurred. See Ray's Med. Jurisp. of Insanity, §§ 295, 297; Matth. de Criminib. Prolegomena, ch. 2, § 13; and Taylor, Med. Jurisp. 789, 790, 4th Ed. Two men who had been hunting during the day slept together at night. One of them was renewing the chase in his dream, and imagining himself present at the death of the stag, cried out, "I'll kill him, I'll kill him!" The other, awakened by the noise, got out of the bed, and by the light of the moon, beheld the sleeper give several stabs with a knife on that part of it which his companion had just quitted: Hervey's Meditations on the Night, n. 35. Suppose a blow given in this way had proved fatal, and that the two men had been shown to have quarrelled before retiring to rest!

(*j*) 3 Benth. Jud. Ev. 49; Bonnier, Traité des Preuves, § 647.

(*k*) 3 Benth. Jud. Ev. 50.

(*l*) *Infrà*, bk. 3, pt. 2, ch. 2.

After observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse-stealing, on the strength of his having been found upon the animal the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief, who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped (*m*). This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him, and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavours to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else. An extremely apt illustration is to be found in the "Arabian Nights' Entertainments" (*n*); where the body of a man who had died by accident in the house of a neighbour was conveyed by him — under the apprehension of suspicion of murder in the event of the corpse being found in his house — into the house of another neighbour; who, finding it there, and acting under the influence of a similar apprehension, in like manner transmitted it to a third; who, in his turn, shifted the possession of the corpse to a fourth, with whom it was found by the officers of justice.

§ 206. 2. The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual. The most obvious instance is to be found in a case, probably of more frequent occurrence than is usually supposed, — namely, where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him (*o*); and a suspicion of murder may be raised by

(*m*) 2 Hale, P. C. 289. A similar conviction occurred in Surrey in 1827, but the fatal result was averted; *R.* v. *Gill*, Wills, Circ. Ev. 54, 3rd Ed. See also the case of *John Jennings*, Theor. of Presumptive Proof, App., case 1; and that of *Du Moulin*, Chambers's Edinb. Journ. for Oct. 28, 1837.

(*n*) 3 Benth. Jud. Ev. 36. The story alluded to is the well-known one of the little hunchback.

(*o*) In the preface to Mr. Arbuthnot's Reports of the Court of Foujdaree Udalut of Madras, Madras, 1851, p. xlii, is the following passage: "In the annals of criminal justice in this country, instances of this species of forgery of real evidence are far from uncommon, — it being a matter of notoriety that the clandestine placing of articles in the houses of accused persons, with a view to facilitate their conviction of a crime charged, is frequently resorted to by the native officers of police; while the production by the police from the houses of accused persons of articles which are really their property, but are alleged to have been obtained by theft or robbery, is still more common."

secreting a bloody weapon in the like manner (*p*). In the case of *Le Brun* (*q*), who was accused of having murdered a lady of rank to whom he was servant, the officers of justice were charged by his advocates with having altered a common key, found in his possession, into a master key, in order to make it appear at the trial that he had a facility for committing the murder which he really did not possess. "Another remarkable example," says Mr. Arbuthnot, in the preface to his Reports of the Foujdaree Udalut of Madras (*r*), "is related in a Report recently published on the Wellicade Jail at Colombo in Ceylon. A man named Sellapa Chitty, of the class termed Nattacotie, reported wealthy, and largely engaged in trade, charged his neighbour and rival in business with causing the death of a Malabar coolie, by burning and otherwise ill-treating him; whereas it was found that the man had died a natural death, and that the prisoner, together with a relative and servant, had applied fire to several parts of the body, and deposited it on the premises of the accused; after which he gave notice to the police, and charged the innocent party with the murder. The case seemed clear, and the accused would have been tried on the capital charge, had not the medical gentleman, on the inquest, observed the unusual appearance of the burnt parts, and finally discovered that the injuries had all been inflicted on the body *after death*." The numerous cases that have occurred of persons inflicting wounds, often of a serious nature, on themselves (*s*) — in some instances for the purpose of enabling them to accuse hated individuals (*t*), in some instances from mere insanity (*u*) — should induce tribunals to be more on their guard against the forgery of real evidence than they commonly are. And as though no limit could be assigned to human wickedness, it is said that even suicide has been committed with a like view (*v*). The following application of this kind of forgery is likely to be made in countries where the legitimate principles of evidence are either not well understood, or not duly observed. We allude to the artifice of sending to the person whom it is desired to injure letters, in which either the mode of committing

(*p*) Theory of Presumptive Proof, App., case 10.

(*q*) 3 Benth. Jud. Ev. 60.

(*r*) Pages xli, xlii.

(*s*) See Tayl. Med. Jurisp. 254 *et seq.*, 3rd Ed.; Beck's Med. Jurisp. 32 *et seq.*, 7th Ed.

(*t*) Tayl. *in loc. cit.* In the "Times" newspaper for Jan. 30, 1847, will be found the case of a girl at Reading, who, enraged against a man for having ceased to live with her, cut her throat severely, and then charged him with having attempted to murder her.

(*u*) See, *e. g.*, the case of Brooks, whose self-mutilation and false charge caused two innocent men to be sentenced to 10 years' penal servitude, at Stafford, in 1880, as is described more at length, *infrà*, bk. 3, pt. 2, ch. 10.

(*v*) We have somewhere read a case of that kind, and believe also that the French Jacobins were accused of having slain, with his consent, one of their number, in order to throw on the Royalists the imputation of having murdered him as a political enemy.

some crime is discussed, or allusion is made to a supposed crime already committed; and then procuring his arrest, under such circumstances that the document may be found in his possession. *E. g.*, "On such an occasion" (naming it), "my dear friend, you failed in your enterprise;" an enterprise (describing it by allusion) of theft, robbery, murder, treason; "on such a day, do so and so, and you will succeed" (*x*). "In this way," observes Bentham, "so far as possession of criminative written evidence amounts to crimination, it is in the power of any one man to make circumstantial evidence of criminality in any shape, against any other" (*y*).

§ 207. It sometimes happens that real evidence is forged with the double motive of self-exculpation, and of inducing suspicion on a hated individual (*z*). And, lastly, it is to be observed that this species of forgery may be accomplished by force as well as by fraud; *e. g.*, three men unite in a conspiracy against an innocent person: one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds there, and denounces him to justice as a thief (*a*).

§ 208. 3. Forgery of real evidence committed either in sport or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct towards him in early life, caused a silver cup to be privately hid in one of their sacks, and after they had gone some distance on their journey, had them arrested and brought back as thieves (*b*).

§ 209. 3.° The other infirmative hypothesis affecting real evidence remains to be noticed; namely, that the apparently criminative fact may have been created by the accused in the furtherance of some lawful, or even laudable design. This is best exemplified by those cases of larceny where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice; but before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him (*c*). In

(*x*) 3 Benth. Jud. Ev. 44.

(*y*) *Id.*

(*z*) See the case of the Flemish parson in 5 Causes Célèbres, 442, Ed. Richer, Amsterd. 1773.

(*a*) 3 Benth Jud. Ev. 39.

(*b*) Genesis, xliv. 2 *et seq.* See 3 Benth. Jud. Ev. 37, 52.

(*c*) The author has an impression of having seen a case on circuit where a

cases of suspected murder, also, stains of blood on the person or dress of the accused or suspected party may have been produced by many causes (*d*); *e. g.*, the slaughter of an animal, an accidental bleeding from the nose (*e*), a surgical operation (*f*), &c.

§ 210. Real evidence, while truly evidentiary of guilt in general, may be fallacious as to the *quality* of the crime. The recent possession of stolen property, for instance, standing alone, is deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their having been stolen (*g*). And there can be little doubt that many persons have been convicted and punished for the former offence whose guilt consisted in the latter; while on the other hand justice has often failed the other way, — a party guilty of receiving stolen property having been erroneously indicted for larceny (*h*). This imperfection in our criminal law was remedied by the 11 & 12 Vict. c. 46, s. 3, and 24 & 25 Vict. c. 96, s. 92, which allow counts for larceny to be joined with counts for receiving goods, knowing them to have been stolen (*i*). So where a person is found dead and plundered of his property, the subsequent possession of a portion of it may induce a suspicion of murder against a party whose real crime was robbery (*k*).

§ 211. There is one species of real evidence which deserves a more particular consideration; namely, the presumption of larceny, arising from possession by the accused of the whole or some portion of the stolen property. Not only is this presumptive evidence of delinquency when coupled with other circumstances; but, even when standing alone, it will in many cases raise a presumption of guilt sufficient to cast on the accused the onus of showing that he came honestly by the stolen property; and in default of his so doing, it will warrant the jury in convicting him as the thief. This presumption is not only subject to the infirmative hypotheses attending real evidence in general; but from its constant occurrence, and the obvious danger of acting indiscriminately upon it, it has, as it were, attracted the attention of judges, who have endeav-

pedlar got drunk in a public-house, and a person present took possession of his pack with the view of returning it to him when sober, and was rewarded for his charity by an indictment for larceny.

(*d*) Quintil. lib. 5, c. 12.

(*e*) *Id.* lib. 5, c. 9.

(*f*) In the case of *William Shaw*, executed at Edinburgh in 1721 for the supposed murder of his daughter, who had committed suicide, one of the facts which pressed against him was that his shirt was bloody, which was, however, caused by his having bled himself some days before, and the bandage becoming untied. Theory of Pres. Proof, App., case 8.

(*g*) *R.* v. *Densley*, 6 C. & P. 399; *R.* v. *Oddy*, 2 Den. C. C. 273, per Alderson, B. See *R.* v. *Langmead*, 1 Leigh & C. 427, 439.

(*h*) See *R.* v. *Collier*, 4 Jur. 703.

(*i*) See also 14 & 15 Vict. c. 100, s. 12.

(*k*) See *R.* v. *Downing*, Wills, Circ. Evid. 137, 3rd Ed.

oured to impose some practical limits to its operation, where it constitutes the *only* evidence against the accused. And, first, it is clearly established that, in order to put the accused on his defence, his possession of the stolen property must be *recent* (*l*); although what shall be deemed recent possession must be determined by the nature of the articles stolen, — *i. e.*, whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely, from his situation in life, or vocation, to become possessed innocently (*m*). A poor man, for instance, might fairly be called to account for the possession of articles of plate, jewels, or rare and curious books, after a much longer time than if the property found on him had consisted of clothes, articles of food suitable to his condition, tools proper for his trade, &c. In the first reported case on this subject (*n*), Bayley, J., directed an acquittal, because the only evidence against the prisoner was, that the stolen goods (the nature of which is not stated in the report) were found in his possession after a lapse of *sixteen* months from the time of the loss. Where, however, seventy sheep were put on a common on the 18th of June, but were not missed till November, and the prisoner was in possession of four of them in October, and of nineteen more on the 23rd of November, the same judge allowed evidence of the possession of both to be given (*o*). In the subsequent case of *R.* v. *Adams* (*p*), where the prisoner was indicted for stealing an axe, a saw, and a mattock, and the whole evidence was that they were found in his possession *three* months after they were *missed*, Parke, B., directed an acquittal. And in a more recent case of *R.* v. *Cruttenden* (*q*), where a shovel which had been stolen was found about *six* or *seven* months after the theft in the house of the prisoner, who was not then at home, Gurney, B., held that, on this evidence alone, the prisoner ought not to be called on for his defence. In *R.* v. *Partridge* (*r*), however, where the prisoner was indicted for stealing two "ends" of woollen cloth (*i. e.*, pieces of cloth consisting of about twenty yards each) which were found in his possession about *two* months after they were *missed;* on its being objected that too long a time had elapsed, Patteson, J., overruled the objection, and the prisoner was convicted. Afterwards, in *R.* v. *Hewlett* (*s*), a prisoner was indicted for stealing three sheets, the

(*l*) 2 Stark. Ev. 614, 3rd Ed ; 5 East, P. C. 657, *R.* v *Cockin*, 2 Lew. C. C. 235; and the cases cited in the following notes.

(*m*) 2 Russ. on Crimes, 275, 5th Ed.; *R.* v. *Partridge*, 7 C. & P. 551; *R.* v. *Cockin*, 2 Lew. C. C. 235 n.

(*n*) *Anon.*, 2 C. & P. 459.

(*o*) *R.* v. *Dewhirst*, 2 Stark. Ev. 614, n. (*e*), 3rd Ed.

(*p*) 3 C. & P. 600.

(*q*) 6 Jur. 267; and MS., Kent Sp. Ass. 1842.

(*r*) 7 C. & P. 551.

(*s*) 3 Russ. on Crimes, 216, 5th Ed.: Salop Sp Ass. 1843.

only evidence against him being that they were found on his bed in his house three calendar months after the theft. On this it was objected by his counsel, on the authority of *R.* v. *Adams*, that the prisoner ought not to be called on for his defence. But Wightman, J., said that it seemed to him impossible to lay down any definite rule as to the precise time within which a prisoner might be called on to give an account of the possession of stolen property; and that although the evidence in the actual case was very slight, it must be left to the jury to consider what weight they would attach to it. The prisoner was acquitted. In *R.* v. *Cooper* (*t*), where a mare which had been lost on the 17th of December was found in the possession of the prisoner between the 20th of June and the 22nd of July following, and there was no other evidence against him, Maule, J., held the possession not sufficiently recent to put him on his defence. In dealing with this subject it is to be remarked that the probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused, — the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all (*u*).

§ 212. But in order to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt (*x*). An exception has been said to exist, where the accused is the occupier of the house in which stolen property is found; because, it is argued, he must be presumed to have such control over the house as to prevent anything coming in or being taken out without his sanction. As a foundation for *civil* responsibility, this reasoning may be correct; but to conclude that the master of a house is guilty of *felony*, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance; and secondly, even supposing they were, that he was the thief who stole them, there being no corroborating circumstances, is certainly treading on the very verge of artificial conviction (*y*).

(*t*) 3 Car. & K. 318.

(*u*) 2 Russ. on Crimes, 278, 5th Ed.: per Erle, J., *R.* v. *Brown*, MS.; Kent Sum. Ass. 1851.

(*x*) 2 Stark. Ev. 614, 3rd Ed., note (*g*).

(*y*) "Il y aurait injustice flagrante, à réputer complice d'un vol celui chez qui l'objet volé serait trouvé, ainsi qu'on le

§ 213. Indeed, there can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. "Nothing," remarks Bentham, "can be more persuasive than the circumstance of possession commonly is, when corroborated by other criminative circumstances; nothing more inconclusive, supposing it to stand alone. Receptacles may be contained one within the other, as in the case of a nest of boxes, — the jewel in a case; the case in a box; the box in a bureau; the bureau in a closet; the closet in a room; the room in a house; the house in a field. Possession of the jewel, *actual* possession, may thus belong to half-a-dozen different persons at the same time; and as to *antecedent* possession, the number of possible successive possessors is manifestly beyond all limit" (*z*). It is in its character of a *circumstance* joined with others of a criminative nature that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive. But whatever the nature of the evidence, the jury must be morally convinced of the guilt of the accused, who is not to be condemned on any artificial presumption or technical reasoning, however true and just in the abstract.

§ 214. When the case against the accused is sufficiently strong to warrant his being called on for his defence, the credit due to any explanation he gives of the way in which the stolen property came into his possession, whether that explanation is supported by evidence or not, is altogether for the consideration of the jury. And here it is necessary to point attention to an important distinction. In *R.* v. *Crowhurst* (*a*), which was an indictment for larceny, Alderson, B., before whom the case was tried, thus directed the jury: "In cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is primâ facie a reasonable

faisait à Rome pour la réparation civile du délit. Présumer la culpabilité, à raison des circonstances qui peuvent n'être que fortuites, c'est là une marche grossière, qui appartient à l'enfance du droit pénal." Bonnier, Traité des Preuves, § 675. See also Hume's Crim. Law of Scotland, vol. I, p. 111.

(*z*) 3 Benth Jud. Ev. 39, 40.

(*a*) 1 Car. & K. 370.

account, and I ought not to be convicted of felony unless it is shown that that account is a false one." This doctrine is confirmed by the cases of *R.* v. *Smith* (*b*) and *R.* v. *Harmer* (*c*). The subsequent case of *R.* v. *Wilson* (*d*) may at first sight seem at variance with it, but is not in reality; for although in that case *R.* v. *Crowhurst* and *R.* v. *Smith* were cited, the decision of the court turned simply on the question whether the whole evidence taken together was sufficient to justify a conviction.

(*b*) 2 Car. & K. 207.
(*c*) 2 Cox, Cr. Cas. 487.
(*d*) 1 Dearsl. & B. 157; 7 Cox, Cr. Cas. 310.

AMERICAN NOTES.

(§ 196) Real Evidence. — (*a*) *Meaning of Term.* — The phrase "Real Evidence," as used in the text and generally, is one of two meanings. By it is understood: (1) The evidence furnished by things, as distinguished from persons, including evidence furnished by persons considered as things; *i. e.*, by human beings when acting in an involuntary and physical, rather than in a voluntary and mental capacity. This is substantially Bentham's definition. 3 Benth. Jud. Ev. 26, 33; 1 Id. 53, 55. Conf. § 12, *supra*. (2) The limited portion of such evidence, of which the tribunal is the original, percipient witness. The two classes of what is commonly styled real evidence stand therefore related to each other as genus and species. The phrase in its (1) sense seems an unnecessary refinement. It substantially accords with other evidence, direct or circumstantial. In the vast majority of instances any reported evidence, not hearsay, is real evidence in this sense. That a prisoner was seen by a witness to turn pale when accused of crime; that the footprints of the prisoner correspond with those found near the *locus* of a murder (Walker *v.* State, 7 Tex. Ct. App. 245; Busby *v.* State, 77 Ala. 66), are facts differing in no substantial manner from other facts which circumstantially tend to establish guilt. To the percipient witness the reported evidence was real; as it comes before the tribunal, it is personal. Com. *v.* Pope, 103 Mass. 440; State *v.* Roberts, 63 Vt. 139. In its (2) sense, however, the phrase has a distinct and recognized meaning, and the evidence so designated a peculiarly strong probative force, — which no reported evidence, in the nature of things, can have. As tending to establish the existence of a fact (as distinguished from the evidentiary bearing of the fact on the point in issue, when established), it is even more conclusive than reported direct evidence. Belief in reported evidence, of whatever nature, involves the accuracy and veracity of the reporter. Here, as the phrase is, "res ipsa loquitur." So, on questions of race, the tribunal can judge by looking at the person. Jones *v.* Jones, 45 Md. 144; Garvin *v.* State, 52 Miss. 207; Warlick *v.* White, 76 N. C. 175. Bones may be exhibited. State *v.* Weiners, 66 Mo. 13; Grangers' Ins. Co. *v.* Brown, 57 Miss. 308. But court may decline to permit an offensive exhibition of the human body, if other evidence exists. Knowles *v.* Crampton, 55 Conn. 336. So specimens of materials are admissible. People *v.* Buddensieck, 103 N. Y. 487; Evarts *v.* Middlebury, 53 Vt. 626; Philadelphia *v.* Rule, 93 Pa. St. 15; King *v.* R. R., 72 N. Y. 607. But see Hood *v.* Bloch, 29 W. Va. 244.

(*b*) *Instances.* — For interesting instances of the use of real evidence, conf. Ruloff *v.* People, 45 N. Y. 213, 224; Udderzook's case, 76 Pa. St. 340; Gaunt *v.* State, 50 N. J. 490. But see Ihinger *v.* State, 53 Ind. 251. So in Com. *v.* Webster (5 Cush. 295), — a case remarkable for the reiterated and powerful use made of this kind of evidence, — when teeth alleged to be those of the deceased are brought into court, together with the plaster casts they are claimed to fit; when a letter written in a peculiar style is introduced, and a swab fitted to make such a letter is produced from the possession of the accused, — we have excellent examples of the cogency of real evidence. Webster case,

Bemis Report, pp. 80, 81, 204, 205, 208, 210. So the evidence gained by inspection of the weapon with which, or the clothes in which, an offence is alleged to have been committed is real. Wynne *v.* State, 56 Ga. 113; Drake *v.* State, 75 Ga. 413; Tudor Iron Wks. *v.* Weber, 129 Ill. 535; People *v.* Gonzales, 35 N. Y. 49; Levy *v.* State, 28 Tex. App. 203; Gardner *v.* People, 6 Parker, C. R. 155. So, in an action for damages, of an injured limb exhibited on trial. Mulhado *v.* R. R., 30 N. Y. 370; State *v.* Garrett, 71 N. C. 85; State *v.* Weiners, 66 Mo. 13; Campbell *v.* State, 55 Ala. 80; Indiana Car Co. *v.* Parker, 100 Ind. 181. But not, it seems, his voice. Com. *v.* Scott, 123 Mass. 222. So of the age, color, or paternity as established by resemblance, of an infant present in court. State *v.* Arnold, 13 Ired. Law, 184; Warlick *v.* White, 76 N. C. 175; Garvin *v.* State, 52 Miss. 207; State *v.* Woodruff, 67 N. C. 89; Stumm *v.* Hummel, 39 Ia. 478; Com. *v.* Emmons, 98 Mass. 6; Hermann *v.* State, 73 Wis. 248; State *v.* Smith, 54 Ia. 104; Gaunt *v.* State, 50 N. J. 490; Finnegan *v.* Dugan, 14 All. 197; State *v.* Woodruff, 67 N. C. 89; Gilmanton *v.* Ham, 38 N. H. 108; State *v.* Arnold, 13 Ired. L. 184; State *v.* Horton, 100 N. C. 443. But see State *v.* Danforth, 48 Ia. 43; Hanawalt *v.* State, 64 Wis. 84; Clark *v.* Bradstreet, 80 Me. 454; Reitz *v.* State, 33 Ind. 187, *contra*. Infant six weeks old not allowed to be exhibited. Clark *v.* Bradstreet, 80 Me. 454. Can produce part of deceased's body in court. Turner *v.* State, 89 Tenn. 547. So whether a suit of clothes fit when tried on in court, is a question of real evidence. Brown *v.* Foster, 113 Mass. 136. A further instance is where the jury is taken to the *locus in quo*, or other place made important by the evidence, to view the premises. Whar. Cr. Pl. § 707. Com. *v.* Webster, Pam. (Bemis Ed.), 31, 32, 46; State *v.* Knapp, 45 N. H. 148; Eastwood *v.* People, 3 Parker, C. R. 25; Chute *v.* State, 19 Minn. 271; State *v.* Bertin, 24 La. An. 46; Boardman *v.* Westchester Ins. Co., 54 Wis. 364. But even if jury have a view, the evidence governs. Hoffman *v.* R. R., 143 Pa. St. 503.

(*c*) *Mixed Real Evidence.* — Real evidence may come before the tribunal blended with other evidence. Thus, in a witness: his statements constitute personal evidence; but the manner of delivering his evidence, his changes of color, and other involuntary display of emotion, the eagerness with which he claims privilege or answers a question, — all this, and the like, is original real evidence. So often of a *document*. In regard to the original source of the statements therein contained, the evidence is personal. The water-mark, various colors of the ink, peculiarities in spelling, character of alterations, if any, and the like, furnish real evidence, — which may be pointed out to the court by experts called for that purpose. Withee *v.* Rowe, 45 Me. 571; Demerritt *v.* Randall, 116 Mass. 331; Dubois *v.* Baker, 30 N. Y. 355; Calkins *v.* State, 14 Oh. St. 222; Wilson *v.* Beauchamp, 50 Miss. 24; Vinton *v.* Peck, 14 Mich. 287. Parties to a suit cannot be compelled to furnish such real evidence. Pennsylvania Co. *v.* Newmeyer, 129 Ind. 401; Kern *v.* Bridwell, 119 Ind. 226; R. R. *v.* Botsford, 141 U. S. 250; Stuart *v.* Havens, 17 Neb. 211; Parker *v.* Enslow, 102 Ill. 272. But see White *v.* R. R., 61 Wis. 536; R. R. *v.* Thul, 29 Kans. 466; Schroeder *v.* R. R., 47 Ia. 375, *contra*.

PART III.

DOCUMENTS.

CHAPTER I.

DOCUMENTARY EVIDENCE IN GENERAL.[1]

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§ 215. The remaining instruments of evidence are Documents, under which term are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, &c., indicate, by notches, the number of

[1] For a statement of the American law, see p. 213.

loaves of bread or quarts of milk supplied to their customers; the old exchequer tallies (*a*), and such like, — are documents as much as the most elaborate deeds. In some instances, no doubt, the line of demarcation between documentary and real evidence seems faint; as in the case of models or drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical* representations.

§ 216. Documents, being inanimate things, necessarily come to the cognisance of tribunals through the medium of human testimony; for which reason some old authors have denominated them *dead* proofs (probatio mortua), in contradistinction to witnesses, who are said to be *living* proofs (probatio viva) (*b*). When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial; when, if he fails to produce them, derivative, or, as it is technically termed, "secondary" evidence of their contents may be given (*c*). When they are in the possession of a third party, he should be served with what is called a subpœna duces tecum; *i. e.*, a summons to attend the trial as a witness and bring the documents with him. The person on whom such a subpœna has been served is bound to obey it, so far as attending the trial and bringing the documents with him; but, by analogy to the principles already explained (*d*), he will not be compelled to produce them if the disclosure might subject him to crimination, penalty, or forfeiture. So a party will not be required to produce the muniments of title to his estate (*e*), nor will his solicitor, to whose care they have been intrusted (*f*); and in either case independent secondary evidence of their contents may be given (*g*). The admissibility of documents in evidence, as well as all preliminary questions of fact on which that

(*a*) These tallies were used as acquittances for debts due to the crown, and for some other purposes. A piece of wood, about two feet long, was cut into a particular uneven form, and scored with notches of different sizes, to denote different denominations of coin, the largest denoting thousands of pounds; after which came respectively hundreds, tens, and units of pounds; while shillings and pence were designated by still smaller notches. The wood was then split down the middle into two parts, so that the cut passed through the notches. One portion was given out to the accountant, &c., which was called the "tally;" the other was kept by the chamberlain, and called the "counterfoil." The irregular form of the tally, together with the natural inequalities in the grain of the wood, rendered fabrication extremely difficult. Tallies were abolished, and receipts substituted, by 23 Geo. 3, c. 82, and 4 & 5 Will. 4, c. 15.

(*b*) Bract. lib. 5, fol. 400 b; Co. Litt. 6 b.

(*c*) Bk. 3, pt. 2, ch. 3.

(*d*) *Suprà*, pt. 1, ch. 1.

(*e*) Tayl. Ev. §§ 458, 1464, 7th Ed.

(*f*) *Hibberd* v. *Knight*, 2 Exch. 11; *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; *Volant* v. *Soyer*, 13 C. B. 231.

(*g*) Per Hill, J., *R.* v. *Leatham*, 3 E. & E. 658, 668; and see *infrà*, bk. 3, pt. 2, ch. 3.

admissibility depends (*h*), and their legal construction when received, are to be decided by the judge; other questions respecting them are for the jury.

§ 217. Although documentary evidence most usually presents itself in a written form, the terms "writing" and "written evidence" have obtained in law a secondary and limited signification in which they are commonly but not always used; and much confusion has arisen from the ambiguous meanings of these terms. This matter cannot be more clearly explained than in the following passage from one of the most eminent of the French jurists: "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollection of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. Thus agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fixed and immutable law for them. So wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heir and legatees. In like manner are written sentences, decrees, edicts, ordinances, and everything intended to have the effect of title or of law, &c. . . . The writing preserves unchangeably what is intrusted to it, and expresses the intention of the parties by their own testimony" (*i*). Now it is to such documents as are here spoken of that the terms "writing" and "written evidence" are commonly applied in our books (*k*). The civilians and canonists appear to have included all such under the general name of "instruments" (*l*); but among us this term is not usually applied to *public* writings. It is not, however, essential to an instrument that it be the act of two or more parties; it may be unilateral as well as synallagmatic. Thus, a deed poll, or a will, is an "instrument," as much as the most complicated indenture consisting of any conceivable number of parts (*m*).

(*h*) Bk. 1, pt. 1, § 82, and note.

(*i*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 2. See the original, *supra*, Introd. pt. 2, § 60. So deeds usually run, "Now this indenture witnesseth, &c.;" and conclude, "In witness whereof, &c.," and agreements commonly say, "It is hereby agreed, &c."

(*k*) The word "writing," as well as the Norman-French "escript," have been used in this sense from the earliest times; see Litt. sect. 365; Co. Litt. 352 a; 5 Co. 26 a. So in 2 Edw. IV. 3, A & B. Nota q̃ *Littleton* voile aver pleđ escript per voy de fait, et voile aver appel' ceo un fait, come adire, fist un fait de feoffment. Et *Choke* dit q̃ c̃ ne poet estre, car il n'est dit un fait, sinon q̃ un livere de cest ust estre fait, p q̃ *Litt.* luy agree a ceo, et dit que il serr̃ appel un writing, et le appel' un escript conteigne q̃ tiel home enfeoffe tiel home."

(*l*) Heinec. ad Pand. pars 4, §§ 126 & 127. See also Devot. Inst. Canon. lib. 3, tit. 9, § 20.

(*m*) Heinec. ad Pand. pars 4, § 128.

§ 218. "Writings" understood in this sense are of two kinds, "public" and "private" (*n*). Under the former come Acts of Parliament, judgments and acts of courts, both of voluntary and contentious jurisdiction, proclamations, public books, and the like. They are divided into "judicial" and "not judicial;" and also into "writings of record" and "writings not of record" (*o*). Records, says Lord Chief Baron Gilbert, "are the memorials of the legislature, and of the king's courts of justice, and are authentic beyond all manner of contradiction" (*p*): they are said to be "monumenta veritatis, et vetustatis vestigia" (*q*), as also "the treasure of the king" (*r*). But the judgments of tribunals are not in general receivable in evidence against those who were neither party nor privy to them; although in some instances the law, from motives of policy, renders them conclusive and binding on all the world, as in the case of judgments in rem (*s*). Among public documents of a judicial nature, but not of record, may be mentioned various forms of inquisition, depositions, examinations, writs, pleadings, &c.; and among those of a public nature not judicial, the journals of the Houses of Parliament, the books of the Bank of England, registers of births, marriages, and deaths, corporation books, books of heralds' visitations, books of deans and chapters, &c.

§ 219. The principle of the admissibility of public writings in general is thus clearly explained in a text-work: "Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends.[1] The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstance that they have been made by authorised and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate, and in some instances upon their antiquity. Where particular facts are inquired into, and recorded

(*n*) *Suprà*, n. (*l*); 2 Ph. Ev. 1, 10th Ed.

(*o*) 2 Ph. Ev. 1, 10th Ed.

(*p*) Gilb. Ev. 7, 4th Ed. See also Plowd. 491; Co. Litt. 260 a; 4 Co. 71 a; Finch, Law, 231; 1 East, 355; 2 B. & Ad. 367.

(*q*) Co. Litt. 118 a; 293 b. See 2 Rol. 296.

(*r*) 11 Edw. IV. 1.

(*s*) *Infrà*, bk. 3, pt. 2, ch. 9.

[1] The American cases are to the same effect. Brundred *v.* Del Hoyo, 20 N. J. 328, 335; Lurton *v.* Gilliam, 2 Ill. 577; Swinnerton *v.* Columbian Ins. Co, 9 Bosw. (N. Y.) 361, acc. Reports of engineers to the war department are not public documents. Cushing *v* Nantasket R. R., 143 Mass. 77. Otherwise of a roster. Worcester *v.* Northborough, 140 Mass. 397. So of baptismal record. Feron *v.* Donnelly, 14 L. C. R. 50, see also 2 Rev. de Lég 332.

for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to the investigation.[1] On the ground, therefore, of the credit due to the agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not requisite that they should be confirmed and sanctioned by the ordinary tests of truth; in addition to this, it would not only be difficult, but often utterly impossible, to prove facts of a public nature by means of actual witnesses examined upon oath" (*t*). This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose: each public document is only receivable in proof of those matters the remembrance of which it was called into existence to perpetuate. Some public writings are like records, — conclusive on all the world; but this is not their general character, as, most usually, they only hold good until disproved.

§ 220. Among private writings, the first and most important are those which come under the description of "deeds;" *i. e.*, "writings sealed and delivered" (*u*). And they differ from inferior written instruments in this important particular; viz., that they are presumed to have been made on good consideration; and this presumption cannot be rebutted (*x*)[2] unless the instrument is impeached for fraud (*y*); whereas in contracts not under seal a consideration must be alleged and proved (*z*). In former ages deeds were rarely signed, and the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.

"Re, verbis, scripto, consenu, traditione,
Junctura, vestes sumere pacta solent"

has been the rule from the earliest times (*a*). "No deed, charter, or writing can have the force of a deed without a seal" (*b*); and

(*t*) Stark. Ev. 272–273, 4th Ed. See acc. *Merrick* v. *Wakley*, 8 A. & E. 170; *Doe* d. *France* v. *Andrews*, 15 Q. B. 759, per Erle, J.; Heinec. ad Pand. pars 4, §§ 127 & 129; and Devot. Inst. Canon. lib. 3, tit. 9, § 20.

(*u*) 2 Blackst. Comm. 295; Co. Litt. 171 b; Finch, L. 108.

(*x*) Plowd. 309; 3 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.

(*y*) *Id.*

(*z*) *Rann* v. *Hughes*, 7 T. R. 350 (n).

(*a*) Bracton, lib. 2, c. 5, fol. 16 b; Plowd. 161 b; Co. Litt. 36 a.

(*b*) 3 Inst. 169.

[1] See § 519, n. 1, *b* (5), *infra*.

[2] In America it has been held that, as a consequence of decreased solemnity accorded a document under seal, the real consideration of a deed can be at all times shown. Rhine *v.* Ellen, 36 Cal. 362; Drury *v.* Imp. Co., 13 Allen, 168; Rabsuhl *v.* Lack, 35 Mo. 316; Booth *v.* Hynes, 54 Ill. 363; Lawton *v.* Buckingham, 15 Ia. 22; Lewis *v.* Brewster, 57 Pa. St. 410; Pierce *v.* Brew, 43 Vt. 292; Frey *v.* Vanderhoof, 15 Wis. 397; Gibson *v.* Fifer, 21 Tex. 260. See also § 226, n. 1, A. (*b*) (6), *infra*.

"traditio loqui facit chartam" (*c*). Deeds are usually attested by witnesses, who subscribe their names, to signify that the deed has been executed in their presence (*d*). Anciently the number of witnesses was greater than at the present day; and when the execution of a deed was put in issue, process was issued against the witnesses whose names appeared on the instrument, who, on their appearance in court, seem to have discharged in some respects the functions of a jury (*e*). If they were all dead it was tried by a jury: "Super fidem chartarum, mortuis testibus, erit ad patriam de necessitate recurrendum" (*f*). In modern practice the rule was that the execution of a deed must be proved by the testimony of at least one of the attesting witnesses (*g*). If they were all dead, or insane, or out of the jurisdiction of the court, or could not be found on diligent inquiry, proof might be given of their handwriting (*h*); but the testimony of third parties, even though they might have been present at the execution of the instrument, was not receivable to *prove* it. They might, however, be received to contradict the testimony of the subscribing witnesses (*i*); although formerly this was doubted (*k*). And so far was this principle carried, that even proof of an admission by a party of the execution of a deed would not in general dispense with proof by the attesting witness (*l*). But it was not necessary to call the attesting witness, or indeed to give any other proof of a deed thirty years old or upwards, and coming from an unsuspected repository (*m*); unless perhaps when there was an erasure or other blemish in some material part of it (*n*).

§ 221. Instruments *not under seal* are sometimes attested by witnesses; and in such cases it was held that the attesting witness must be called, or his handwriting proved, as in the case of a deed (*o*). But since the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 26, and the 28 Vict. c. 18, ss. 1, 7, it is not necessary, either in civil or criminal proceedings, to prove, by the attesting witness, any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise, as if there

(*c*) 5 Co. 1 a; Lofft, Max. 159, 188.

(*d*) 2 Blackst. Comm. 307.

(*e*) 2 *Id.* 307, 308; Co. Litt. 6 b.

(*f*) Co. Litt. 6 b.

(*g*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*h*) See the cases collected, Stark. Ev. 512–521, 4th Ed. and 2 Phill. Ev. 254 *et seq.*, 10th Ed.

(*i*) *Blurton* v. *Toon*, Holt, 290; *Hudson's case*, Skin. 79; *Lowe* v. *Joliffe*, 1 W. Bl. 365; *Pike* v. *Badmering*, cited 2 Str. 1096; *Jackson* v. *Thomason*, 1 B. & S. 745.

(*k*) Per Alderson, B., in *Whyman* v. *Garth*, 8 Exch. 803.

(*l*) *Infrà*, bk. 3, pt. 2, ch. 7.

(*m*) 2 Phill. Ev. 245–246, 10th Ed.

(*n*) *Id.* 247.

(*o*) *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469; *Streeter* v. *Bartlett*, 5 C. B. 562; *Doe* d. *Sykes* v. *Durnford*, 2 M. & Sel. 62; *Higgs* v. *Dixon*, 2 Stark. 180.

had been no attesting witness thereto. And so, by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 526, any document required by that Act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses, or any of them. Where there is no attesting witness the usual proof is by the handwriting of the party. The proof of handwriting is so important and peculiar that it will be considered separately (*p*).

§ 222. Next, as to wills. By the Statute of Frauds, 29 Car. 2, c. 3, s. 5, it was enacted, that all wills of lands, to be valid, should be in writing and signed by the party, or by some other person in his presence and by his directions, and be attested in his presence by at least three credible witnesses. Wills of personalty remained as at the common law, and did not require any witness. But by the Wills Act, 7 Will. 4, and 1 Vict. c. 26, this part of the Statute of Frauds is repealed; and it is enacted by sect. 9, that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In carrying out the provisions of this enactment, many wills, just and regular in all other respects, were rendered inoperative for inadvertent non-compliance with the forms which it prescribed. To remedy this was passed 15 & 16 Vict. c. 24, s. 1, which, after reciting sect. 9 of the previous Act, enacts in a very full and elaborate manner that "Every will shall, as regards the position of the signature of the testator, be deemed to be valid, if the signature shall be so placed at or after, or following or under, or beside, or opposite to the end of the will, that it shall be apparent that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end (*q*) of the will, or by similar circumstances minutely described in the enactment (*r*).

§ 223. Although documents are necessarily brought before the tribunal by means of verbal or parol evidence, that evidence must

(*p*) See *infrà*, ch. 2.

(*q*) Qu., *Hunt* v. *Hunt*, L. Rep., 1 P. & D. 209.

(*r*) See *In the goods of Wotton*, L. Rep., 3 P. & D. 159.

be limited to giving such a general description of the document as shall be sufficient to identify it, and deposing to the real evidence afforded by its visible state. Thus a keeper of records may speak as to the *condition* in which they are, but not as to their *contents* (*s*). It is commonly said that "Parol evidence is inferior (or secondary) to written;" that "Written evidence is superior to verbal," &c. (*t*); but these axioms must be understood with much allowance and qualification. That evidence *in writing*, using the phrase latiori sensu, is superior to or even more satisfactory than *verbal* evidence, cannot, as a general proposition, be supported. Suppose a man witnesses a transaction, and after he goes home commits a narrative of it to paper, or even puts his seal to the paper, and fifty men attest it as witnesses; whether his memory or that paper would be the best and more trustworthy proof of what took place depends very much on circumstances, — such as the natural strength of his memory, whether the transaction were of a nature likely to make an impression on his mind, the time that has elapsed, &c. It is true that the writing has the advantage of *permanence;* it will not decay so soon as the memory of the witness, — "Vox audita perit; litera scripta manet." But, on the other hand, the witness may be *cross-examined*, and compelled to give a circumstantial account of all he saw and heard; while the writing only preserves what was committed to it in the first instance, without power of addition or explanation, — "Minus obstitisse videtur pudor inter paucos signatores" (*u*); "Testibus, non testimoniis, credendum" (*x*); added to which, the evidence of the witness would be given under the sanction of an oath. So, considered merely with reference to probative force, the notes of the judge, taken at a trial, would probably be deemed very satisfactory evidence of what there took place. They are not, however (except for the purposes of considering whether or not a new trial should be granted), even receivable as evidence of it. A judge of the High Court only takes notes for his own private convenience; there is no law requiring him to do so (*y*) (although section 120 of the County Courts Act, 1888, re-enacting section 6 of the County Courts Act, 1875, obliges county court judges to take notes of questions of law and of the facts relating thereto in cases where there is a right of appeal, and they are requested by either party so to do). Indeed, in former times the judges either made no notes, or notes much more scanty than at present; and of Pratt, C. J., in

(*s*) *Leighton* v. *Leighton*, 1 Str. 210.

(*t*) Contra scriptum testimonium, non scriptum testimonium non fertur. Cod. lib. 4, tit. 20, l. 1.

(*u*) Quint. Inst. Orat lib. 5, c. 7.

(*x*) Burnett's Crim. Law of Scotland, 495.

(*y*) Per Lord Abinger, C. B., in *Leach* v. *Simpson*, 5 M. & W. 309, 311.

particular, it is said that he never made any (*z*). The truth is, that the maxims in question have three applications: 1. In the case of records and other instruments, which the policy of the law requires to be in writing and executed with prescribed formalities, no derivative, and consequently no verbal, or other parol (*a*) evidence of their contents is receivable, until the absence of the original writing is accounted for; neither is parol or other extrinsic evidence receivable, at least in general, to contradict, vary, or explain them. 2. A like rule holds where writing or formalities are not required by law, but the parties have had recourse to them for the sake of greater solemnity and security; as where a man executes a bond to secure the payment of money, when an unattested writing would have been sufficient; or where a contract for the sale of goods under 10*l.* (and consequently not within the Statute of Frauds) is reduced to writing, &c. (*b*). 3. Where the contents of *any document* are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its *own contents* (*c*). But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some *act*, independent proof aliundè is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it (*d*). Or suppose a man had declared by deed, or even put on record — if such a thing can be supposed — his intention to rob or murder another, this would not exclude verbal or other evidence, that he had made similar declarations of intention by word of mouth. So, although where the *contents* of a marriage register are in issue, verbal or other evidence of those contents is not receivable, the *fact* of the marriage may be proved by the independent evidence of a person who was present at it. This distinction is well illustrated by the case of *Horn* v. *Noel* (*e*), in which it was proposed to support the defence of the coverture of the defendant by two witnesses, who deposed that they were present in a Jewish synagogue when the defendant was married to H. N. The plaintiff's counsel contended that this evidence was insufficient; that it was necessary for the defendant to show that a marriage had been celebrated according to the rites of the Jews; that

(*z*) See the note to 17 How. St. Tr. 1420.

(*a*) This is not the only instance in our law where the word "parol" is used in a different sense from "verbal" or "oral." Thus written contracts not under seal are said to be parol "contracts," &c. *Rann* v *Hughes*, 7 T. R. 350–351, note.

(*b*) See the distinction taken in *Bellamy's case*, 6 Co. 38, between deeds "ex institutione legis" and "ex provisione hominis." See also, per Cutler, 21 H. VII. 5 b, pl. 2; *Buxton* v. *Cornish*, 12 M. & W. 426; *Knight* v. *Barber*, 16 *Id.* 66; and Dig. lib. 22, tit. 4, ll. 4 and 5.

(*c*) *Infrà*, bk. 3, pt. 2, ch. 3.

(*d*) *Rambert* v. *Cohen*, 4 Esp. 213.

(*e*) 1 Camp. 61.

with them what took place in the synagogue was merely a ratification of a previously written contract; and as that contract was essential to the validity of the marriage, it ought to be produced and proved (*f*). The contract, in the Hebrew tongue, was accordingly put in, and translated by means of an interpreter, and the plaintiff was nonsuited. It must also be added that the rule excluding parol evidence as inferior to written does not exclude *circumstantial* (*g*), nor, according to the better opinion, *self-prejudicing* evidence (*h*).

§ 224. But although documentary evidence may not be receivable for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its *permanence* is not always lost to justice. Thus, a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination, as a script to refresh his memory (*i*).[1]

§ 225. As connected with this subject may be noticed the maxim of law, "Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est" (*k*). "Quomodo quid constituitur," says one of our old books, "eodem modo dissolvitur; record per record, escript per escript (*l*), parliament per parliament, parol per parol" (*m*). For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed (*n*). This principle was also recognised by the Roman law, — "Nihil tam naturale est, quam eo genere quicquid dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur: nudi consensus obligatio contrario consensu dissolvitur" (*o*). But the performance of a condition in an instrument under seal may be proved by inferior evidence (*p*); for this does not invalidate the instrument, but sets it up. Thus payment of a bond may be proved by parol (*q*), &c.

(*f*) See on this subject Rogers's Eccl. Law, 659, 2nd Ed.

(*g*) Bk. 3, pt. 2, ch. 1.

(*h*) Bk. 3, pt. 2, ch. 7.

(*i*) *Sandwell* v. *Sandwell*, Comb. 445, Holt, 295; *Doe* d. *Church* v. *Perkins*, 3 T. R. 749; *Burton* v. *Plummer*, 2 A. & E. 341; *Beech* v. *Jones*, 5 C. B. 696; *Smith* v. *Morgan*, 2 Moo. & R. 257; 2 Phill. Ev. 480 *et seq.*, 10th Ed.; *Dyer* v. *Best*, 4 H. & C. 189.

(*k*) 2 Inst. 360, 573; 4 Inst. 28; 2 Co. 53 a; 4 *Id.* 57 b; 5 *Id.* 26 a; 6 *Id.* 43 b; Jenk. Cent. 2, Cas. 25; 3 Scott, N. R. 215; 17 Q. B. 146.

(*l*) By *escript* here must be understood a writing under seal. The word is often used in our old books in this sense. See *supra*, § 217.

(*m*) Jenk. Cent. 2, Cas. 40. See *Wood* v. *Leadbitter*, 13 M. & W. 838.

(*n*) Wing. Max. 69; Co. Litt. 338 a.

(*o*) Dig. lib. 50, tit. 17, l. 35.

(*p*) See the authorities cited in *West* v. *Blakeway*, 3 Scott, N. R. 199.

(*q*) Doct. & Stud. Dial. 1, ch. 12.

[1] See American note, p. 216.

§ 226. It has been already stated (*r*), and is indeed an obvious branch of the principle in question, that "parol," or, to speak more correctly, "extrinsic" evidence, is not *in general* receivable to contradict, vary, or explain written instruments.[1] "It would be inconvenient," says one of our old books, "that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory" (*s*). But there are many cases where the rejection of such proof would be the height of injustice, and even be absurd. 1. With respect to the varying or explaining of instruments there are two rules: "Ambiguitas verborum *patens* nullâ verificatione excluditur" (*t*); "Ambiguitas verborum *latens* verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur." The following commentary by Lord Bacon on the latter of these maxims is the recognised basis of the law governing this subject (*u*): "There be two sorts of ambiguities of words, — the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." A host of cases on this subject, with numerous qualifications and distinctions, are to be found in the books (*x*). We will merely add the following important observations from the work of Vice-Chancellor Wigram, "Extrinsic Evidence in the Interpretation of Wills" (*y*): "A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning, when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the pro-

(*r*) *Suprà*, § 223.
(*s*) 5 Co. 26 a.
(*t*) Lofft, Max. 249.
(*u*) Bac. Max. of the Law, Reg. 23.
(*x*) See the cases collected in 2 Phill. Ev. ch. 8, 10th Ed.; and Wigram's "Extrinsic Evidence in the Interpretation of Wills," 4th Ed. And see also *Grant* v. *Grant*, L. Rep., 5 C. P. 380; *S. C.* (in Cam. Scacc.), *Id.* 727; *Sherratt* v. *Mountford*, L. Rep., 8 Ch. App. 928.
(*y*) § 200 *et seq.* 4th Ed.

[1] See American law stated at p. 217.

priety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy, — a proposition too absurd for an argument. . . . Again, a distinction must be taken between *inaccuracy* and *ambiguity* of language. Language may be *inaccurate* without being *ambiguous*, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage, are cases in which no ambiguity really exists. The meaning is certain notwithstanding the inaccuracy of the testator's language."

§ 227. 2. There are some other exceptions to the rule rejecting intrinsic evidence to affect written instruments. Foremost among them come those cases where it is sought to impeach written instruments as having been obtained by duress (*z*), menace (*a*), fraud, covin, or collusion (*b*); which, as is well known, vitiate all acts, however solemn, or even judicial (*c*). "Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit" (*d*), "Dolus et fraus nemini patrocinantur" (*e*); "Jus et fraus nunquam cohabitant" (*f*); "Qui fraudem fit frustrà agit" (*g*); "Dolus circuitu non purgatur" (*h*). To reject parol or other extrinsic proof in such cases would be to apply the rule in question to a purpose for which it was never intended, and to render it a protection to practices which the object of the law is to suppress. But the party to an instrument is estopped from setting up his own fraud, &c., to avoid the instrument (*i*); as also are those claiming under him; and the like rule

(*z*) Dig. lib. 50, tit. 17, l. 116; Perkins, § 16; Bac. Max. Reg. 6; 6 Ho. Lo. Cas. 44, 45; 11 Q. B. 112; 2 Exch. 395; 6 Exch. 67.

(*a*) Dig. *in loc. cit.*; Bac. Max. Reg. 22; Shep. Touch. 61; 11 A. & E. 990; 6 Q. B. 280.

(*b*) Dig. lib. 44, tit. 4; Gibert, Corp. Jur. Can. Prolegom. Pars Post. pp. 27 & 28.

(*c*) That judicial acts may be impeached for fraud, see bk. 3, pt. 2, ch. 9.

(*d*) Bac. Max. Reg. 22.

(*e*) M. 30 Edw. III. 32; 14 Hen. VIII. 8 A.; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

(*f*) 10 Co. 45 a.

(*g*) 2 Roll. 47.

(*h*) Bacon, Max. Reg. 1.

(*i*) 2 Phill. Ev. 360, 10th Ed. See bk. 3, pt. 2, ch. 7.

holds in the case of menace or duress (*k*). These principles are found in the laws of other countries as well as our own (*l*), —

> " ——— Nec lex est justior ulla,
> Quàm necis artifices arte perire suâ " (*m*).

§ 228. 3. Another exception is to be found in the admissibility of the evidence of usage: [1] " Optimus interpres rerum usus " (*n*); " Magister rerum usus " (*o*); " Consuetudo loci est observanda " (*p*). Many of the cases on this subject will be found collected in Broom's Maxims (*q*); and the general principles by which it is governed are thus clearly laid down in a work of authority: " Evidence of usage has been admitted in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind, — when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognised practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties " (*r*). " Evidence of usage has been admitted in contracts relating to transactions of commerce, trade, farming, or other business, — for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted, with the view of giving effect, as far as can be done, to the presumed intention of the parties. Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that

(*k*) Bracton, lib. 2, c. 5, fol. 15 b; Dyer, 143 b, pl. 56; Plowd. 19; Shep. Touch. 60, 61; *Atlee* v. *Backhouse*, 3 M. & W. 650, per Parke, B.

(*l*) Dig. lib. 4, tit. 2; Cod. lib. 8, tit. 54, l. 27; Lancel Inst. Jur. Canon. lib. 2, tit. 25, § 13; Domat, Lois Civiles, part. 1, liv. 3, tit. 6, sect. 2, § 5; Code Civil, liv. 3, tit. 3, ch. 6, sect. 3, § 2, art. 1353; Bonnier, Traité des Preuves, § 643, &c.

(*m*) 1 H. Bl. 585.

(*n*) 2 Inst. 282.

(*o*) Co. Litt. 229 b.

(*p*) 6 Co. 67 a; 7 *Id.* 5 a; 10 *Id.* 140 a.

(*q*) Pp. 882–896, 4th Ed.

(*r*) 2 Phill. Ev. 407, 10th Ed. See also 2 Stark. Ev. 361, 3rd Ed.

[1] For some consideration of the American cases on this subject, see p. 223.

they contracted in reference to it, and in conformity with it (*s*). With this understanding, the reception of evidence of usage is not only justifiable in principle, but absolutely necessary; and without it, the intention of the parties would be often defeated. Usage may be proved, though not general; it may be local, and to a small extent, — or professional, — or only in a particular branch of business, or among a particular class of persons. Even the usage, or rather the practice, of an individual firm with which a party has contracted, may be resorted to as a medium of exposition, if it may be reasonably inferred that he contracted in reference to such practice" (*t*).

But "the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication" (*u*). So although where "the language of ancient charters is become obscure from its antiquity, or the construction is doubtful, the constant and immemorial usage under the instrument may be resorted to for the purpose of explanation," still "it can never be admitted to control or contradict the express provisions of the instrument" (*x*). And lastly, where the incident sought to be annexed to a contract is of such a nature that the parties are not themselves competent to introduce it by express stipulation, such an incident cannot be annexed by the tacit stipulation arising from usage. *E. g.*, the parties to a contract which is not by law negotiable cannot make it negotiable by an express stipulation to that effect; and, therefore, the incident of negotiability cannot be added to such a contract by evidence of usage (*y*).

§ 229. It seems a rule of universal jurisprudence that imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, &c., do not vitiate the document unless they are in some *material* part of it (*z*). One of our old books lays down generally that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after" (*a*). Other authorities seem disposed to extend this

(*s*) See, as to this, *Kirchner* v. *Venus*, 12 Moo. P. C. 361, 399.

(*t*) 2 Phill. Ev. 415–416, 10th Ed.

(*u*) *Id.* 417.

(*x*) *Id.* 419.

(*y*) *Crouch* v. *Crédit Foncier of England*, L. Rep., 8 Q. B. 374, 386.

(*z*) Mascard. de Prob. Concl. 256, 284; Lancel. Inst. Jur. Can. lib. 3, tit. 14, § 43; Devot. Inst. Canon. lib. 3, tit. 9, § 21, 5th Ed.; Fleta, lib. 6, c. 34, s. 5; Co. Litt. 225 b; 10 Co. 92 b; Cro. Car. 399; Dicks. Law Ev. in Scotl. 179. The rule laid down in *Pigot's case* — viz., that the alteration of a deed by the obligee himself, *although it be in words not material*, makes the deed void — has been held not to be law. *Aldous* v. *Cornwell*, L. Rep., 3 Q. B. 573, 579.

(*a*) *Trowel* v. *Castle*, 1 Keb. 21 (5), recognised Butl. Co. Litt. 225 b, n. (1).

doctrine to erasures (*b*); and both positions have been confirmed by the Court of Queen's Bench (*c*). But that an erasure or alteration in a *suspicious* place must be explained by the party seeking to enforce the instrument has been law from the earliest times (*d*). And this principle is fully recognised at the present day (*e*), especially where an alteration affects the stamp required for a document (*f*). The whole subject is, however, guarded by many restrictions and limitations (*g*). And in the case of wills, the presumption seems to be the other way, — the rule being that, having regard to the Statute of Frauds, and the 7 Will. 4, and 1 Vict. c. 26, s. 21, the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence, from which the jury may infer that the alteration was made before the will was executed (*h*).

§ 230. Various Acts of Parliament — for the system is unknown to the common law — have imposed, as a condition precedent to the admissibility in evidence of most documents, the prepayment to the state of a sum of money, the receipt of which is indicated by a "stamp." An exposition of the Stamp Laws (which were consolidated, firstly, by the Stamp Act, 1870, 33 & 34 Vict. c. 97, and, secondly, by the Stamp Act, 1891, 54 & 55 Vict.) would be wholly unsuited to this work; but there are four things connected with the subject which ought to be borne in mind: —

First, A document which is lost (*i*), or not produced on notice (*k*), will, in the absence of evidence to the contrary, be presumed to have been duly stamped (*l*).

Secondly, The stamp which is required to be affixed to the docu-

(*b*) Shep. Touch. 53, n. (*l*), 8th Ed.

(*c*) *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745. See also, per Lord Cranworth, V.-C., *Simmons* v. *Rudall*, 1 Sim. N. S. 115, 136.

(*d*) 7 Edw. III. 57, pl. 44; and 27, pl. 13.

(*e*) *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469.

(*f*) *Knight* v. *Clements*, 8 A. & E. 215.

(*g*) See Tayl. Ev. §§ 1616–1638; *Davidson* v. *Cooper*, 11 M. & W. 778; 13 *Id.* 343.

(*h*) *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747, 755; *In the goods of Sykes*, L. Rep., 3 P. & D. 26; *Simmons* v. *Rudall*, 1 Sim. N. S. 126. But the court was not precluded by the absence of *direct* evidence from considering the nature of the alterations, and the *internal* evidence furnished by the document itself. Per Sir J. P. Wilde, *in the goods of Cadge*, L. Rep., 1 P. & D. 543, 545.

(*i*) *Pooley* v. *Godwin*, 4 A. & E. 94; *Hart* v. *Hart*, 1 Hare, 1; *R.* v. *The Inhabitants of Long Buckby*, 7 East, 45.

(*k*) *Crisp* v. *Anderson*, 1 Stark. 35; *Closmadeuc* v. *Carrel*, 18 C. B. 36. See also the case of *Bradlaugh* v. *De Rin*, L. Rep., 3 C. P. 286, as to the presumption that an instrument on which there is a stamp when produced at the trial was stamped in proper time.

(*l*) If satisfactory evidence be given that, at any time after it was executed, the instrument was unstamped, this presumption is at an end, and the party who relies on the instrument must prove that it was duly stamped. *Marine Investment Company* v. *Heaviside*, L. Rep., 5 App. Ca. 624.

ment is that which is "in accordance with the law in force at the time when it was first executed" (*p*).

Third, The requirement of the stamp as a condition precedent to the admissibility of the document does not extend to criminal proceedings (*q*).

Fourthly, The ordinary requirement of the law being that documents should be stamped at the time of their execution, a twofold, and in some cases a threefold, penalty, in addition to the stamp duty, must be paid before an unstamped document can be admitted in evidence (*r*).

Under the Act of 1870 and acts prior thereto, an unstamped document was held to be evidence for some collateral purposes, as, for instance, to prove fraud or illegality in a transaction of which the document formed part (*r'*); but the 14th section of the Stamp Act, 1891, contains the new provision that an unstamped document shall not, except in criminal proceedings, be given in evidence *for any purpose whatever.*

(*p*) Stamp Act, 1891, s. 14. Before the Act of 1870 the law was otherwise, see *Deakin* v. *Penniall*, 2 Ex. 230.

(*q*) Stamp Act, 1891, s. 14.

(*r*) *Id.*

(*r'*) *Cobpock* v. *Bower*, 4 M. & W. 361; *Ionides* v. *Pacific Insurance Co.*, L. R., 7 Q. B. 517.

AMERICAN NOTES.

(§ 215) Documentary Evidence. — A. Definition of Document. B. Public Documents (see § 485, n. 1, *infra*). C. Private Documents.

A. Definition of Document. — The term "document" is one of difficult definition, many so-called documents being more properly classed under the head of real evidence. (Conf. § 196, n. 1, *supra.*) Best defines "document" as including "all material substance on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol," and expressly includes milkmen's scores, exchequer tallies, and the like. (§ 215, *supra.*) Wharton defines document as "an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used." 1 Whar. Ev. § 614. Stephen's definition is similar, though more restricted: "Any substance having any matter expressed or described upon it by marks capable of being read." (Dig. Law Ev., art. 1.) Within these definitions, a ring or banner with an inscription, a musical composition, and a savage tattooed with words intelligible to himself, would all be documents. Photographs, caricatures, wooden tallies, and the like, would probably be excluded under Stephen's definition; not apparently under the others.

While the sweeping definitions given *supra* are probably sufficiently accurate for the purpose of distinguishing documentary from personal evidence, it may be doubted whether the definition of "document" could not with advantage be narrowed in certain instances to the single case of writing as a means of conveying thought. Thus, it is submitted, the so-called "best evidence rule" (see C. III. (*a*) of this note, *infra*) applies only to written documents. For example, in Com. *v.* Morrell, 99 Mass. 542, it was held that the tag of a valise on which words were inscribed was not a document. But see R. R. Co. *v.* Maples, 63 Ala. 601.

C. Private Documents. — I. Production (see § 624, n. 1, *infra*). II. Proof of Execution. III. Proof of Contents.

II. Proof of Execution. — (*a*) *Attested Documents;* (*b*) *Documents not attested.* (*a*) *Attested Documents.* — The execution of any instrument to which there are subscribing witnesses must, if such instrument is used in aid of a suit or defence, or is directly in issue, be proved by the evidence of such subscribing witnesses, or one of them. In case the attendance of such witness or witnesses cannot be procured, proof of his or their signature or signatures is to be given. Tylden *v.* Bullen, 3 U. C. Q. B. R. 10. This rule constitutes a striking and almost a single instance of "pre-appointed evidence," strictly so called. (Conf. § 31, *supra.*) The parties are conclusively presumed to have agreed that such an instrument shall not be offered in evidence without proof, by the chosen witness, of the circumstances attending its execution. Kinney *v.* Flynn, 2 R. I. 319; Coleman *v.* State, 79 Ala. 49; Jones *v.* Phelps, 5 Mich. 218; Hollenback *v.* Fleming, 6 Hill (N. Y.), 303; Melcher *v.* Flanders, 40 N. H. 139; Davis *v.* Alston, 61 Ga. 225; Barry *v.* Ryan, 4 Gray, 523; Ayres *v.* Hewett, 1 Applet. 281, 286; Chaplain *v.* Briscoe, 19 Miss. 372. The testimony of such a witness may, however, be supplemented or contradicted. Whitaker *v.* Salisbury, 15 Pick. 534; Quimby *v.* Buzzell, 4 Shepl. 470; Duckwall *v.* Weaver, 2 Ohio, 13; Smith *v.* Asbell, 2 Strobh. 141. See also Territory *v.* Ely, 6 Dak. 128; Groover *v.* Coffee, 19 Fla. 61. The rule is universal, and applies to a simple receipt as fully as to a more formal instrument. Pearl *v.* Allen, 1 Tyler, 4. For statutory modifications of the rule, see 1 Greenl. Ev. § 569, and notes. If the subscribing witness forgets or denies his attestation, other evidence of execution may be resorted to. Reinhart *v.* Miller, 22 Ga. 402. The testimony or verified signature of a single subscribing witness is sufficient, — Burnett *v.* Thompson, 13 Ired. 379, — unless the judge, in his discretion, requires further proof by production of the others. White *v.* Wood, 8 Cush. 413. Where one party claims title under a recorded deed, it has been held that an office copy of such deed is admissible in evidence, and that the execution of such office copy need not be proved. Knox *v.* Silloway, 1 Fairf. 201; Woodman *v.* Coolbroth, 7 Greenl. 181; Loomis *v.* Bedel, 11 N. H. 74; Kelsey *v.* Hanmer, 18 Conn. 311; Gragg *v.* Learned, 109 Mass. 167. If a party, producing on notice, claims an interest under the deed, the party demanding production need not prove execution. Chisholm *v.* Sheldon, 2 Grant's Chancery Reps. 178.

Admissions. — It is immaterial that the party against whom such instrument is offered as evidence has admitted its execution. Story *v.* Lovett, 1 E. D. Smith, 153; Brigham *v.* Palmer, 3 Allen, 450; Fox *v.* Reil, 3 Johns 477. The further fact that the admission is a judicial one, made for the express purpose of dispensing with other proof of execution, does not alter the rule. Ellis *v.* Smith, 10 Ga. 253. With regard to how far an admission will act as proof of the contents of a document not produced in evidence, conf. C. III. (*c*) of this note, *infra.*

Exceptions. — (1) *Ancient Documents.* — In case of genuine instruments thirty years old coming from proper custody, the subscribing witnesses are conclusively presumed to be dead. Such documents are said "to prove themselves." Henthorne *v.* Doe, 1 Blackf. 157; Thruston *v.* Masterson, 9 Dana, 228, 233; Walton *v.* Coulson, 1 McLean, 120; King *v.* Little, 1 Cush. 436; Fairly *v.* Fairly, 38 Miss. 280; Bank of Middlebury *v.* Rutland, 33 Vt. 414; Carter *v.* Chaudron, 21 Ala. 72; Glasscock *v.* Hughes, 55 Tex. 461; McReynolds *v.* Longenberger, 57 Pa. St. 13; Little *v.* Downing, 37 N. H. 355; Duncan *v.* Beard, 2 Nott & McC. 400; Clark *v.* Owens, 18 N. Y. 434; Burgin *v.* Chenault, 9 B. Monr. 285; Weitman *v.* Thiot, 64 Ga. 11. But see Fell *v.* Young, 63 Ill. 106; Maclem *v.* Turnbull, 5 U. C. Q. B. R. 129. In Massachusetts it has been held that the subscribing witness, if alive, must be called to testify, though the deed is over thirty years old. Tolman *v.* Emerson, 4 Pick. 160. It has, moreover, been frequently held that possession under such a document constitutes, in case of a deed, a condition precedent to admissibility without proof of execution. Jackson *v.* Blanshan, 3 Johns. 292; Carroll *v.* Norwood, 1 Har. & J. 167, 174; Middleton *v.* Mass, 2 Nott & McC. 55; Shaller *v.* Brand, 6 Binn. 435. To the same effect see Homer *v.* Cilley, 14 N. H. 85; Ridgeley *v.* Johnson, 11 Barb. Sup. Ct. 527; Brown *v.* Wood, 6 Rich. (S. C.) Eq. 155, *contra.*

(2) *Adverse Claim.* — So also in case the attested instrument be produced from the custody of the adverse party who claims an interest under such instrument; the claim is held to admit the execution. Jackson *v.* Kingsley, 17 Johns. 158; Rhoades *v.* Selin, 4 Wash. (C. C.) 715; Herring *v.* Rogers, 30 Ga. 615; McGregor *v.* Wait, 10 Gray, 72.

(3) *Unavailable Witness.* — A third exception obtains in cases where, after diligent search, the party is unable to find such witness within the jurisdiction, or where, for other reasons, the witness cannot be produced. Jackson *v.* Burton, 11 Johns. 64; Homer *v.* Wallis, 11 Mass. 309; Cooke *v.* Woodrow, 5 Cranch, 13; Baker *v.* Blount, 2 Hayw. 404; Watts *v.* Kilburn, 7 Ga. 356; Dunbar *v.* Marden, 13 N. H. 311; Emery *v.* Twombly, 5 Shepl. 65; Teall *v.* Van Wyck, 10 Barb. 376; Foote *v.* Cobb, 18 Ala. 585. In such case, the absence of all attesting witnesses must satisfactorily be accounted for, to let in secondary evidence of the execution by proof of signature of an attesting witness. Kelsey *v.* Hanmer, 18 Conn. 311; Kelly *v.* Dunlap, 3 Pa. Rep. 136; Woodman *v.* Segar, 25 Me. 90. In case no subscribing witness is available, and no proof of his handwriting can be offered, evidence of the handwriting of the testator or obligor is to be given. Jones *v.* Blount, 1 Hayw. 238; Clark *v.* Sanderson, 3 Binn. 192; Duncan *v.* Beard, 2 Nott & McC. 400. But where a subscribing witness voluntarily incapacitates himself to testify to its execution by becoming interested therein, such deed cannot be proved by other evidence. McKinley *v.* Irvine, 13 Ala. 681; Packard *v.* Dunsmore, 11 Cush. 282; Keefer *v.* Zimmerman, 22 Md. 274, *contra*. See also Gellott *v.* Goodspeed, 8 Cush. 411; Eslow *v.* Mitchell, 26 Mich. 500.

(4) *Public Officer.* — So if the person against whom the document is sought to be proved is a public officer, bound by law to procure its due execution, who has dealt with it as duly executed. Scott *v.* Waithman, 3 Starkie, N. P. 168. Under the scope of this exception would probably come the rule that official bonds need not be proved by an attesting witness. Kello *v.* Maget, 1 Dev. & Bat. 414.

(*b*) *Documents not attested.* — In case of an instrument without attesting witness, execution is sufficiently proved by competent proof that the undersigned signature is a genuine one. Pullen *v.* Hutchinson, 12 Shepl. 249, 254. For the rules regulating proof of handwriting, see § 232, n. 1, *infra*.

III. Proof of Contents. — (*a*) *Best Evidence Rule.* — In proving the contents of a written instrument, the document itself must be produced, or its absence accounted for to the satisfaction of the judge. Johnson *v.* Arnwine, 42 N. J. L. 451; Delaney *v.* Errickson, 10 Brown (Neb.), 492; Page *v.* Page, 15 Pick. 368; Snow *v.* Carr, 61 Ala. 363; Woodworth *v.* Barker, 1 Hill (N. Y.), 172; Bachelder *v.* Nutting, 16 N. H. 261. So of a telegram, Matterson *v.* Noyes, 25 Ill. 591; Whilden & Sons *v.* Bank, 64 Ala. 1. Probably this rule applies also to documents offered in cross-examination to test the credibility of a witness. Gaffney *v.* People, 50 N. Y. 416; Stamper *v.* Griffin, 12 Ga. 450. The rule also applies to proof of the text of a foreign law. Conf. § 511, n. 1 (*d*), *infra*. The Pawashick, 2 Lowell, 142, 145; Livingstone *v.* Ins. Co., 6 Cranch, 274; Ennis *v.* Smith, 14 Howard, 401. But see 1 Greenl. Ev. §§ 88, 463.

If the document is in the possession or control of the adverse party, a reasonable notice to produce the document must be served on such party or his attorney. U. S. *v.* Winchester, 2 McLean, 135, Farnsworth *v.* Sharp, 5 Sneed (Tenn.), 615; Dean *v.* Border, 15 Tex. 298; Potier *v.* Barclay, 15 Ala. 439; Grimes *v.* Fall, 15 Cal. 63; Carlard *v.* Cunningham, 37 Pa. St. 228; Anderson Bridge Co. *v.* Applegate, 13 Ind. 339; Patterson *v.* Linder, 14 Ia. 414; Dapey *v.* Ashby, 2 A. K. Marsh. (Ky.) 11; Williams *v.* Benton, 12 La. An. 91; Kennedy *v.* Fowke, 5 Har. & J. 63; Choteau *v.* Raitt, 20 Ohio, 132; Robertson *v.* Parks, 3 Md. Ch. 65; Com. *v.* Emery, 2 Gray, 80; Farmers' Bank *v.* Lonergan, 21 Mo. 46; Weeks *v.* Lyon, 18 Barb. 530; McAdam *v.* Spice Co., 64 Ga. 441; Heward *v.* McDougall, 3 Q. B. U. C. o. s. 647. Upon refusal to produce after due notice, or other satisfactory reason being given for the absence of primary evidence, the party wishing to prove such document is entitled to introduce secondary evidence of its contents.

(*b*) *Proof Required.* — The absence of the original document is satisfactorily accounted for by proof, — (1) That the writing is in court and in the control of the other side. Dana *v* Boyd, 2 J. J. Marsh. 587; Brandt *v.* Klein, 17 Johns. 335; Rhoades *v.* Selin, 4 Wash. C. C. 715, 718; Brown *v.* Isbell, 11 Ala. 1009. (2) Or that the document is hopelessly lost or out of the jurisdiction of the court. McCreary *v.* Hood, 5 Blackf. 316; McAuley *v.* Earnhart, 1 Jones (N. C.) L. 502; Shepherd *v.* Giddings, 22 Conn. 282; Pond *v* Lockwood, 8 Ala 669; Ralph *v.* Brown, 3 Watts & Serg. 395; Burton *v.* Driggs, 20 Wall. 125. In case the document is proved to have existed and been lost from the

custody of the party offering secondary evidence of its contents, it is customary to require that the affidavit of such party should state reasonable search, and give a reasonable explanation of facts attending loss. Riggs *v.* Tayloe, 9 Wheat. 283, 486; Seekright *v.* Bogan, 1 Hayw. 178, n.; Fitch *v.* Bogue, 19 Conn. 285; Blade *v.* Nolan, 12 Wend. 173; Blake *v.* Fash, 44 Ill. 302; Bagley *v.* McMickle, 9 Cal. 430, Tobin *v.* Shaw, 45 Me. 331; Joannes *v.* Bennett, 5 All. 169. (3) Or that a stranger to the suit has been seasonably notified to produce the document, and has failed to do so. Conf. § 624, n. 1, *infra*. R. *v.* Bourassa, 3 Quebec, L. R. 359. (4) Or that the document is not easily removed. 1 Greenl. Ev. §§ 91–94. (5) Or that the document has come into the possession of the other party through fraud. Pickering *v.* Myers, 2 Bailey, 113; Nealley *v.* Greenough, 5 Foster, 325; Morgan *v.* Jones, 24 Ga. 155; State *v.* Mayberry, 48 Me. 218, Rose *v.* Lewis, 10 Mich. 483; Hart *v.* Robinett, 5 Mo. 11; Hamilton *v.* Rice, 15 Tex. 382; Com. *v.* Messinger, 1 Binn. 273. (6) Or that the form of action of itself constitutes a notice to produce. Nealley *v.* Greenough, 5 Foster, 325; Luckett *v.* Clark, Litt. (Ky.) Sel. Cases, 178; Hays *v.* Riddle, 1 Sandf. (N. Y.) 248; Edwards *v.* Bonneau, 1 Sandf. Sup. Ct. Rep. 610. Or that the document in question is itself a notice. Morrow *v.* Com., 12 Wright, 305.

(*c*) *Execution.* — Though secondary evidence of the contents of a document be given, it is still necessary to prove the due *execution* of the instrument. Schrowders *v.* Harper, 1 Harr. 444; Kimball *v.* Morrell, 4 Greenl. 368; Kelsey *v.* Hanmer, 18 Conn. 311; Porter *v.* Wilson, 1 Harr. 641; Elmondorff *v.* Carmichael, 3 Litt. 472. Whether any admission of the contents of a document not introduced in evidence will dispense with production, or further proof, — in other words, whether Slatterie *v.* Pooley (6 M. & W. 664) is law in this country, — is in dispute. 1 Greenl. Ev. §§ 97, 203. In Massachusetts such proof is allowed. Smith *v.* Palmer, 6 Cush. 513, 520; Loomis *v.* Wadhams, 8 Gray, 557. See also Kriser *v.* Neason, 66 Pa. St. 253; Perry *v.* Lawless, 5 U. C. Q. B. R. 514. In New York the proof is rejected. Jenner *v.* Joliffe, 6 Johns. 9; Hasbrook *v.* Baker, 10 Johns. 248; Welland Canal *v.* Hathaway, 8 Wend. 480. But see Mauri *v.* Heffernan, 13 Johns. 58, 74; Thomas *v.* Harding, 8 Greenl. 417; Corbin *v.* Jackson, 14 Wend. 619.

(*d*) *Degrees in Secondary Evidence.* — For some consideration of whether there are any degrees in secondary evidence with regard to admissibility as distinguished from probative force, conf. § 87, n. 1, *supra*. See also 1 Greenl. Ev. §§ 84, n., 582, n. That such degrees do not exist, see Winn *v.* Patterson, 9 Peters, 663; Gracie *v.* Morris, 22 Ark. 415; Goodrich *v.* Weston, 102 Mass 362; Eslow *v.* Mitchell, 26 Mich. 500; Smith *v.* Brown, 151 Mass. 338; Rochleau *v.* Bidwell, Dra. K. B. U. C. Rep. 345. That there are degrees in secondary evidence, see Williams *v.* Waters, 36 Ga. 454; Coman *v.* Armstrong, 4 Blackf. (Ind.) 241; Ford *v.* Cunningham, 87 Cal. 209; Cornet *v.* Williams, 20 Wall. 226. The fact that a prevailing doctrine exists that there are no degrees in secondary evidence has an important bearing on the supposed existence of the sweeping "best evidence rule" stated by the author. See § 87, n. 1, *supra*.

(§ 224) *Documents refreshing Memory.* — A witness will be permitted to "refresh his memory" by an examination of memoranda reasonably contemporaneous with the transactions to which they relate, regarding dates, figures, results of calculation, minutes of testimony, and the like, whether such memoranda be made by the party himself or by any other person. Hill *v.* State, 17 Wis. 675; Green *v.* Caulk, 16 Md. 556; Cobb *v.* Boston, 109 Mass. 438, 444; Com. *v.* Ford, 130 Mass. 64; Bank *v.* Zorn, 14 S. C. 444, 450; R. R. *v.* Burke, 55 Tex. 323; Fraser *v.* Fraser, 14 C. P. U. C. 70; State *v.* McKee, 94 N. C. 325; Solomon R. R. *v.* Jones, 34 Kans. 443; People *v.* Kelly, 113 N. Y. 647; Bank of DuBois *v.* Bank of Williamsport, 114 Pa. St. 1; Friendly *v.* Lee, 20 Oreg. 202. *Provided* that the witness, after inspection or otherwise, is able to testify, either (1) that the statements contained in such memoranda are accurate in his present recollection; State *v.* Lull, 37 Me. 246; George *v.* Joy, 19 N. H. 544; Acklen's Exec. *v.* Hickman, 63 Ala. 494; Hubby *v.* State, 8 Tex. Ct. App. 597, 607; or (2) from a present recollection, that the memoranda were accurate when made. Downer *v.* Rowell, 24 Vt. 343; Cooper *v.* State, 59 Miss. 267; State *v.* Rawls, 2 Nott & McC. 331; Owens *v.* State, 67 Md. 307; Marcly *v.* Shults, 29 N. Y 346; Briggs *v.* Rafferty, 14 Gray, 525; Mims *v.* Sturdevant, 36 Ala. 636; State *v.* Colwell, 3 R. I. 132. So of the minutes of testimony taken by the judge at a

former trial. Fitzpatrick *v.* Fitzpatrick, 6 R. I 64. But see Hubby *v.* State, 8 Tex. Ct. App. 597, 607, People *v.* Elyea, 14 Cal. 144. That it is not necessary memorandum should be made by witness personally, see Paige *v.* Carter, 64 Cal. 489; Third Nat. Bk. *v.* Owen, 101 Mo. 558. Watson *v.* Miller, 82 Tex. 279, *contra.* That a copy is sufficient, see Lawson *v.* Glass, 6 Col. 134; Bonnet *v.* Glattfeldt, 120 Ill. 166, Sanders *v.* Wakefield, 41 Kans. 11; Finch *v.* Barclay, 87 Ga. 393. The evidence on a former trial is admissible to refresh recollection. Stone *v.* Ins. Co., 71 Mich. 81. Whether a document used to refresh memory becomes *ipso facto* evidence in the case, is in dispute. The other side is entitled to inspect and cross examine. Peck *v.* Valentine, 94 N. Y. 569; Davis *v.* Field, 56 Vt. 426; R. R. *v.* O'Brien, 119 U. S. 99. It is admissible in evidence, if positively testified to by the witness. Ruch *v.* Rock Island, 97 U. S. 693, 695; Halsey *v.* Sinsebaugh, 15 N. Y 485. Such document is also admissible where the witness is unable to testify from a present recollection, but can only state from his present recollection of past probabilities a certainty that the memorandum or other document was a correct minute of the transaction to which it relates. Smith *v.* Lane, 12 S. & R. 80, 84; Merrill *v.* Ithaca & Osw. R. R. Co., 16 Wend. 586; Kelsea *v.* Fletcher, 48 N. H. 282; Pinkham *v.* Benton, 62 N. H. 687; Nat. Bk. *v.* Madden, 114 N. Y. 280; State *v.* Jordan, 110 N. C. 491. But if all the knowledge of the witness is contained in the memorandum, it is not admissible. Maxwell *v.* Wilkinson, 113 U. S. 656. The opposite party has the right of inspection. McKivitt *v.* Cone, 30 Ia. 455; Cortland Co. *v.* Platt, 83 Mich. 419.

(§ 226) Parol Evidence Rule. — A. Solemn Instruments inter vivos. B. Wills.

A. Solemn Instruments inter vivos. — (*a*) *Scope of Rule.* — Parol evidence is inadmissible to vary, add to, cut down, control, or contradict the ascertained purport of any document under seal, or other valid written instrument of a solemn and conclusive nature, in any suit founded upon such instrument and between parties or privies thereto. "Parol" in this connection includes extrinsic written evidence prior in time and less conclusive in nature. 1 Greenl. Ev. §§ 275–305; Brown *v.* Spofford, 95 U. S 474; Fay *v.* Gray, 124 Mass. 500; Brandon *v.* Morse, 48 Vt. 322; Bell *v.* Woodman, 60 Me. 465; Bokkelen *v.* Taylor, 62 N. Y. 105, Hogey *v.* Hill, 75 Pa. St. 108; Hough *v.* Ins. Co., 36 Md. 398; Serviss *v.* Stockstill, 30 Oh St. 418; Conwell *v.* R. R., 81 Ill. 232; Atkinson *v.* Blair, 38 Ia. 156; Irish *v.* Dean, 39 Wis 562, Whitehead *v.* Park, 53 Ga. 575; Kochring *v* Muemminghoff, 61 Mo. 403; Trammell *v.* Pilgrim, 20 Tex. 158; Winston *v.* Browning, 61 Ala. 80; Kelley *v* Saltmarsh, 146 Mass. 585; Joseph *v.* Ostell, 1 L. C. Jur. 265; R R. *v.* Jones, 63 Tex. 524; Parish *v.* Perham, 84 Me. 563; Millsaps *v.* Bank, 69 Miss. 918; McClure *v.* Campbell, 25 Neb. 57; Naumberg *v.* Young, 44 N. J. L. 331; R. R. *v* Beeler, 90 Tenn. 548; R. R. *v.* Jones, 82 Tex. 156; Ortt *v* R. R., 36 Minn. 396; Ray *v.* Blackwell, 94 N. C 10; Bonsack Co. *v* Woodrum, 88 Va. 512; Schoen *v* Sunderland, 39 Kans. 758; Auditor-General *v.* Supervisors, 89 Mich. 552; County *v.* Wood, 84 Mo. 489; Dodge *v.* Kiene, 28 Neb. 216; Case *v* Bridge Co., 134 N Y. 78, Bigelow *v* Wilson, 77 Ia. 603; Haworth *v.* Norris, 28 Fla. 763, Coapstick *v.* Bosworth, 121 Ind. 6, Smith *v.* Fitzgerald, 59 Vt. 451; Moffitt *v.* Maness, 102 N. C. 457; Northwestern Fuel Co. *v* Bruns, 1 N. Dak. 137; Harvey *v.* Pennypacker, 4 Del. Ch. 445; Lee *v.* Fowler, 19 S C. 607; Herbst *v.* Lowe, 65 Wis 316; Bank *v.* Boulton, 7 U C. Q. B 235; Chamberlin *v.* Ball, Q. B., 5 L. C. Jur. 88 The rule does not apply to parol collateral agreements. La Roche *v.* O'Hagan, 1 Ont. Rep. 300; Brown *v.* Deacon, 12 Grant's Ch. Rep. 198; McGinness *v.* Kennedy, 29 Q. B. U. C. 93; Ayer *v.* Bell Mfg. Co., 147 Mass. 46, R. R. *v.* Dawson, 62 Tex. 260; Beyerstedt *v.* Winona Mill Co., 51 N. W. Reporter, 619; Snow *v.* Alley, 151 Mass. 14; Cullmans *v.* Lindsay, 114 Pa St. 166, Redfield *v.* Gleason, 61 Vt. 220; Tuley *v.* Barton, 79 Va. 387; Collette *v.* Weed, 68 Wis 428; Chapin *v.* Dobson, 78 N. Y. 74; Byers *v* McMillan, 15 S. C. Canada, 194. The rule does not extend to mere receipts. Parol evidence is admissible to explain or even contradict such instruments. Wilson *v* Derr, 69 N. C. 137; Stapleton *v.* King, 33 Ia. 28; Richardson *v.* Beede, 43 Me. 161; Guyette *v.* Bolton, 46 Vt. 228; Foster *v.* Newbrough, 58 N. Y. 481; Nelson *v.* Weeks, 111 Mass. 223; Calhoun *v.* Richardson, 30 Conn. 210; Russell *v.* Church, 65 Pa. St. 9; Ditch *v.* Vollhardt, 82 Ill. 134; Schultz *v.* R. R., 44 Wis 638; City Bank *v* Kent, 57 Ga. 283; Pool *v.* Chase, 46 Tex. 207; Grumley *v* Webb, 44 Mo. 444; Wildrick *v* Swain, 34 N J Eq. 167; Steinhoff *v* McRae, 13 Ont.

Rep. 546; Baskerville *v.* Doan, 12 C. P. U. C. 127; Whitney *v.* Clark, 3 L. C. Jur. 318; Montforton *v.* Bondit, 1 Q. B U. C 362; Cowan *v.* Sapp, 74 Ala. 44; Hicks *v.* Leaton, 67 Mich. 371; Riley *v.* Mayor, 96 N. Y. 331; Shoemaker *v.* Stiles, 102 Pa. St. 549; Watson *v.* Miller, 82 Tex. 279; Burke *v.* Ray, 40 Minn. 34; R. R. *v.* Jones, 34 Kans. 443; McLane *v.* Johnson, 59 Vt. 237; Grant *v.* Hughes, 96 N. C. 177; Bowen *v.* Humphreys, 24 S. C. 452; Chapman *v.* Sutton, 68 Wis. 657; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564; Rader *v.* McElvane, 21 Oreg. 56; Thompson *v.* Maxwell, 74 Ia. 415; McDonald *v.* Dana, 154 Mass. 152; Adams *v.* Davis, 109 Ind. 10; Connell *v.* Vanderwerken, 1 Mackie, 242; R. R. *v.* Allen, 46 Ark. 217; Cowan *v.* Abbott, 92 Cal. 100; Tuley *v.* Barton, 79 Va. 387; The Sophia, 1 Stuart, Adm. 219. And see Livingston *v.* Wood, 27 Grant's Ch. Rep. 515; West *v.* Fleck, 15 L C. R. 422; Wolfe *v.* Dyer, 95 Mo. 545. That a bill of lading cannot be modified by parol, see Cox *v.* Peterson, 30 Ala. 608; R. R. *v.* Remmy, 13 Ind. 518; Arnold *v.* Jones, 26 Tex. 335. *Contra*, Baker *v.* Michigan R. R., 42 Ill. 73; Fowler *v.* Stirling, 3 L. C. Jur. 103; Baltimore Steamboat Co. *v.* Brown, 54 Pa. St. 77; Hedricks *v.* Morning Star, 18 La. An. 353; Blade *v.* Chicago R. R., 10 Wis. 4. See also, as to ordinary bills of parcels, Harris *v.* Johnston, 3 Cranch, 311; Linsley *v.* Lovely, 26 Vt. 123; McTyer *v.* Steele, 26 Ala. 487. With regard to the conclusive effect of judgments see § 588, n. 1 (*b*), *infra*. That judgments and other judicial records cannot be varied by parol (except as hereinafter stated), see Sanger *v.* Upton, 91 U. S. 56; Stewart *v.* Morrison, 67 Me. 549; Gorman's case, 124 Mass. 190; Hill *v.* Burke, 62 N. Y. 111; Wallace *v.* Coil, 24 N. J. L. 600; Coxe *v.* Deringer, 78 Pa. St. 271; Burthe *v.* Denis, 133 U. S. 514; Taylor *v.* Wallace, 31 Oh. St. 151; Ney *v.* R. R., 20 Ia. 347; Lawver *v* Langhans, 85 Ill. 138; Lamothe *v.* Lippott, 40 Mo. 142; McFarlane *v.* Randle, 41 Miss. 411; Edwards *v.* Edwards, 25 La. An. 200; Wilson *v.* Wilson, 45 Cal. 399.

The supposed reason of the "parol evidence rule," stated *supra*, assumes that in choosing the solemn form employed to express and embody their agreement parties have intended thereby fully to express that agreement, — removing it in this way from debatable questions, and beyond bad faith or the "uncertain testimony of slippery memory." Countess of Rutland's case, 5 Co Rep. 25. To admit parol evidence would, in the intendment of law, utterly defeat this object. The instrument therefore is conclusive as to the point which it covers. Freeman *v.* Bass, 34 Ga. 355; Couch *v.* Woodruff, 63 Ala. 466, Weeks *v.* Medler, 20 Kans. 57. As a natural consequence, the rule does not apply to third persons, or to suits between one party and a stranger. Dempsey *v.* Kipp, 61 N. Y. 462, 471; Fonda *v.* Burton, 63 Vt. 355; Selser's Estate, 141 Pa. St. 529; Hussman *v.* Wilke, 50 Cal. 250; Furbush *v.* Goodwin, 25 N. H. 425; Hughes *v.* Sandal, 25 Tex. 162; Blake *v.* Hall, 19 La. An. 49. All anterior and contemporaneous stipulations and representations are merged in the writing, and cannot be given in evidence. Gooch *v.* Connor, 8 Mo. 391; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274; Rowell *v.* Newton, Q. B. 10 L. C. R. 437; Wonderly *v.* Holmes Lumber Co., 56 Mich. 412; Corse *v.* Peck, 102 N. Y. 513; Chaplin *v.* Baker, 124 Ind. 385; Ferguson *v.* Rafferty, 128 Pa. St. 337; Gilpin *v.* Greene, 7 U. C. Q. B. 587. So no evidence of conversations leading to a contract is admissible. Gilpins *v.* Consequa, Peters, C. C. 86; Ellmaker *v.* Ins. Co., 5 Barr, 183; Bedford *v.* Flowers, 11 Humph 242.

It follows that, if the instrument was not, in point of fact, intended fairly to represent the agreement of the parties, the rule, as above stated, does not apply. Chamberlain *v.* Smith, 21 Q. B. U. C. 103; Bradshaw, Admr. *v.* Combs, 102 Ill. 428; Pacific Works *v.* Newhall, 34 Conn. 67; Crane *v.* Elizabeth &c., 29 N. J. Law, 302; Cole *v.* Howe, 50 Vt. 35; McCormick *v.* Cheevers, 124 Mass. 262; Hope *v.* Balen, 58 N. Y. 380; Randall *v.* Turner, 17 Oh. St 262; Perry *v.* Hill, 68 N. C. 417; Moss *v.* Green, 41 Mo. 389; Mobile Co. *v.* McMillan, 31 Ala. 711; Thomas *v.* Hammond, 47 Tex. 42; Bladen *v.* Wells, 30 Md 577.

(*b*) *Exceptions.* — The so-called exceptions to the parol evidence rule seem rather to fall outside its scope. As a necessary consequence of the limited nature of the rule and the objects to be attained by it, it follows that any evidence is admissible which, as a matter of substantive law, may form, in law or equity, ground of relief against the operation of the instrument, though the effect, and indeed the object, of such evidence is to contradict such instrument. Thus, (1) evidence is admissible to show that an instrument was pro-

cured or influenced by fraud or misrepresentation. Cushing *v.* Rice, 46 Me. 303; Thompson *v.* Bell, 37 Ala. 438; Selden *v.* Myers, 20 How. (U. S.) 506; Lull *v.* Cass, 43 N. H. 62; Montgomery *v.* Pickering, 116 Mass. 227; Meyer *v.* Huneke, 55 N. Y. 412; Wharton *v.* Douglass, 76 Pa. St. 273; Burtners *v.* Keran, 24 Gratt. 42; Gage *v.* Lewis, 68 Ill. 604; Hines *v.* Driver, 72 Ind. 125; McLean *v.* Clark, 47 Ga. 24; Turner *v.* Turner, 44 Mo. 535; Thomas *v.* Kennedy, 24 La. An. 209; Grider *v.* Clopton, 27 Ark. 244; Cook *v.* Moore, 39 Tex. 255; Fuller *v.* Lamar, 53 Ia. 477; Wade *v.* Saunders, 70 N. C. 270; Barnard *v.* Roane Iron Co., 85 Tenn. 139; Mayer *v.* Dean, 115 N. Y. 556; Wishard *v.* McNeil, 78 Ia. 40; Kirkpatrick *v.* Clark, 132 Ill. 342; Gross *v.* Drager, 66 Wis. 150. The same rule applies to the case of a will. McLaughlin *v.* McDevitt, 63 N. Y. 213; Lewis *v.* Mason, 109 Mass. 169; Harvey *v.* Sullens, 46 Mo. 147; Robb *v.* Graham, 43 Ind. 1. (See B. (*a*) of this note, *infra*.) (2) Or by duress. Hibbard *v.* Mills, 46 Vt. 243; Knapp *v.* Hyde, 60 Barb. 80; Miller *v.* Miller, 68 Pa. St. 486; Seiber *v.* Price, 26 Mich. 518; Davis *v.* Luster, 64 Mo. 43; Moore *v.* Rush, 30 La. An. 1157; Spaids *v.* Barrett, 57 Ill. 289; Bosley *v.* Shanner, 26 Ark. 280; Cook *v.* Moore, 39 Tex. 255. (3) Or was executed for purposes forbidden by law. Chamberlain *v.* McClung, 8 W. & S. 31; Totten *v.* U. S., 92 U. S. 105; Pratt *v.* Langdon, 97 Mass. 97; Hewitt *v.* Dement, 57 Ill. 500; Newsom *v.* Thighen, 30 Miss. 414; Shackford *v.* Newington, 46 N. H. 415; Lazare *v.* Jacques, 15 La. An. 599. (4) Or that the instrument was executed by a person legally incapable, at the time, of incurring liability, by reason of some incapacity, natural or superinduced, or by operation of law. Staples *v.* Wellington, 58 Me. 453; Webster *v.* Woodford, 3 Day, 90; Mitchell *v.* Kingman, 5 Pick. 431; Beals *v.* See, 10 Barr, 56; Case *v.* Case, 26 Mich. 484; Wigglesworth *v.* Steers, 1 Hen. & M. 70; Wiley *v.* Ewalt, 66 Ill. 26; Phelan *v.* Gardner, 43 Cal. 306; Parker *v.* Davis, 8 Jones (N. C.), 460. (5) So also, in cases where the active aid of a court of equity is invoked with regard to a written agreement, evidence will be received that such agreement was founded upon a mistake of material facts. Story, Eq. Juris. §§ 153–162; Milmine *v.* Burnham, 76 Ill. 362; Mays *v.* Dwight, 82 Pa. St. 462; Merchants' Bk. *v.* Morrison, 19 Grant's Ch. Rep. 1; McDonald *v.* Rose, 17 Grant's Ch. Rep. 657; Noble *v.* Lahaye, 1 R. L. 197; Avery *v.* Miller, 86 Ala. 495; Goode *v.* Riley, 153 Mass. 585; Smith *v.* Butler, 11 Oreg. 46; Vignie *v.* Brady, 35 La. An. 560; Cleveland *v.* Burnham, 64 Wis. 347; Erving *v.* Sandoval Coal Co., 110 Ill. 290; Montgomery *v.* Shockey, 37 Ia. 107; Bryce *v.* Ins. Co., 55 N. Y. 240; Nelson *v.* Davis, 40 Ind. 366; Hearst *v.* Pujol, 44 Cal. 230; Muller *et al. v.* Rhuman, 62 Ga. 332; Miller *v.* Davis, 10 Kans. 541; Nat. Bank *v.* Ins. Co., 62 Me. 519; Gammage *v.* Moore, 42 Tex. 170; Allen *v.* Yeater, 17 W. Va. 128. 131. But mistake in law not being ground for equitable relief, evidence of such mistake will not be received to vary or control the effect of a written instrument. Gebb *v.* Rose, 40 Md. 387; Potter *v.* Sewall, 54 Me. 142; Mellish *v.* Robertson, 25 Vt. 603; Dickinson *v.* Glenney, 27 Conn. 104; Heavenridge *v.* Mondy, 49 Ind. 434; Goltra *v.* Sanasack, 53 Ill. 456; Moorman *v.* Collier, 32 Ia. 138; Thurmond *v.* Clark, 47 Ga. 500; McMurray *v.* St. Louis, &c. Co., 33 Mo. 377; Winslow *v.* Driskell, 9 Gray, 363. That parol evidence will be received in equity to show that a deed *prima facie* absolute is in reality a trust or a mortgage, see 2 Whar. Ev. §§ 1031–1038; Peugh *v.* Davis, 96 U. S. 332; Matthews *v.* Sheehan, 69 N. Y. 585; Weathersly *v.* Weathersly, 40 Miss. 462; Raynor *v.* Lyons, 37 Cal. 452; Holt *v.* Moore, 37 Ark. 145; Wright *v.* Gay, 101 Ill. 233; Lawrence *v.* DuBois, 16 W. Va. 443, 459; Barnhart *v.* Patterson, 1 Grant's Ch. Rep. 459; Matthews *v.* Holmes, 5 Grant's Ch. Rep. 1; Bernard *v.* Walker, 2 E. & A. Ont. 121; Barr *v.* Barr, 15 Grant's Ch. Rep. 27; Williams *v.* Jenkins, 18 Grant's Ch. Rep. 536; Peagler *v.* Stabler, 91 Ala. 308; Ripley *v.* Seligman, 88 Mich. 177; Beck *v.* Beck, 43 N. J. E. 39; Ryan *v.* O'Connor, 41 Oh. St. 368; Pancake *v.* Cauffman, 114 Pa. St. 113; Nesbitt *v.* Cavender, 27 S. C. 1; Lewis *v.* Bayliss, 90 Tenn. 280; Perkins *v.* West, 55 Vt. 265; Parker *v.* Logan, 82 Va. 376; McCormick *v.* Herndon, 67 Wis. 648; Kibby *v.* Harsh, 61 Ia. 196; Bank *v.* Ashmead, 23 Fla. 379; McLean *v.* Ellis, 79 Tex. 398; Clark *v.* Haney, 62 Tex. 511; Marsh *v.* Davis, 33 Kans. 326; Lofton *v.* Sterrett, 23 Fla. 565; Crow *v.* Watkins, 48 Ark. 169; Learned *v.* Tritch, 6 Col. 432; Bright *v.* Knight, 35 W. Va. 40; Gilchrist *v.* Beswick, 33 W. Va. 168; Brick *v.* Brick, 98 U. S. 514; Campbell *v.* Dearborn, 109 Mass. 130; Grant *v.* Frost, 80 Me. 202; Crutcher *v.* Muir, 90 Ky. 142. (6) So it may be shown that the instrument was always

inchoate or conditional. That it was at no time freely and finally delivered to the plaintiff by the party charged, in accordance with its apparent tenor. Greenawalt *v.* Kohne, 85 Pa. St. 369; Lipscomb *v.* Lipscomb, 32 S. C. 243; Cuthrell *v.* Cuthrell, 101 Ind. 375; Reynolds *v.* Robinson, 110 N. Y. 654; Norman *v.* Waite, 30 Neb. 302; Juilliard *v.* Chaffee, 92 N. Y. 529, 535; Wilson *v.* Powers, 131 Mass. 539; Butler *v.* Smith, 35 Miss. 457; Roberts *v.* Mullenix, 10 Kan. 22; Earle *v.* Rice, 111 Mass. 17; Brick *v.* Brick, 98 U. S. 514; Beall *v.* Poole, 27 Md. 645. See also Odenbaugh *v.* Bradford, 67 Pa. St. 96; Lindauer *v.* Cummings, 57 Ill. 195; Clark *v.* Wash. Ins. Co., 100 Mass. 509; Stanton *v.* Miller, 65 Barb. 58. (7) So also parol evidence is admissible to prove that a written instrument, or part thereof, has been discharged Leathe *v.* Bullard, 8 Gray, 545; LeFevre *v.* LeFevre, 4 S. & R. 241; Walker *v* Wheatly, 2 Humph. 119. So can always show the real consideration of a deed, or other instrument. Shank *v.* Coulthard, 19 Grant's Ch. Rep. 324; Manning *v.* Pippen, 86 Ala. 357; Kelly *v.* Carter, 55 Ark. 112; Davis *v.* McSherry, 7 Q. B. U. C. 490; Wood *v.* Moriarty, 15 R. I. 518; Strauss *v.* Bodeker, 86 Va. 543; Wolfe *v.* McMillan, 117 Ind. 587; Bolles *v.* Sachs, 37 Minn. 315; Belleville Bank *v.* Bornman, 124 Ill. 200; Champion *v.* Munday, 85 Ky. 31; Ohleyer *v.* Bernheim, 67 Miss. 75; Pitts *v.* Allen, 72 Ga. 69; Guidery *v.* Green, 95 Cal. 630; Sullivan *v.* Lear, 23 Fla. 463; Brice *v.* Miller, 35 S. C. 537. See also § 220, n. 1, *supra.* Or that it has been so modified, by subsequent oral agreement, as to raise an equity in favor of one of the parties. Lawrence *v.* Dole, 11 Vt. 549; Leathe *v.* Bullard, 8 Gray, 545; Magill *v.* Stoddard, 70 Wis. 15; Renier *v.* Ins. Co., 74 Wis. 89. It is immaterial that such modifying agreement is within the Statute of Frauds. Stearns *v.* Hall, 9 Cush. 31. (8) Or that a new agreement has been substituted by consent of the parties. Cummings *v.* Arnold, 3 Met. 486; Marshall *v.* Baker, 1 Appl. 402; Bradshaw, Admr. *v.* Combs, 102 Ill. 428; Bannon *v.* Aultman, 80 Wis. 307. Or that the time of performance has been extended by parol. Stearns *v.* Hall, 9 Cush. 31, 34; Peck *v.* Beckwith, 10 Oh. St. 497; Eastman *v.* Rolland, 2 L. C. L. J. 216; Branch *v.* Wilson, 12 Fla. 543. But see Green *v.* Randall, 51 Vt. 67; Wilson *v.* Deen, 74 N. Y. 531.

(*c*) *What evidence is admissible. Explanation.* — It being ascertained, as a preliminary question, that the written instrument fairly and fully represents the intent of the parties at the time of its execution, the duty of the court becomes merely one of interpretation and construction of the language employed, — the object being to ascertain the expressed meaning of the parties. That meaning, once ascertained, is incontrovertible by any parol evidence; no new words can be added; the court cannot, as is said, "travel out of the four corners of the paper." But the language to be interpreted is to be read in the light of all circumstances, it being often impossible to tell what a man has said until it is ascertained what he meant to say. "In every case the words used must be translated into things and facts by parol evidence." Doherty *v.* Hill, 144 Mass. 465. Any relevant evidence, therefore, which fairly partakes of the nature of explanation, or is reasonably calculated to place the court in the situation of the parties at the time of execution, will, in general, be received. Weber *v.* Illing, 66 Wis. 79; Hinneman *v.* Rosenback, 39 N. Y. 98; French *v.* Hayes, 43 N. H. 30; Camp *v.* Simmons, 62 Ga. 73; Heirs of Watrous *v.* McKie, 54 Tex. 65; Hosmer *v.* McDonald, 80 Wis. 54; Kentucky Co. *v.* Hall, 125 Ind. 220; Linney *v.* Wood, 66 Tex. 22; Reinhart *v.* Oconto Co., 69 Wis. 352; Whitney *v.* Wall, 17 C. P. U. C. 474; Miller *v.* Palmer, 3 U. C. Q. B. o. s. 425; Ins. Assoc. *v.* Wickham, 141 U. S. 564; Ins. Co. *v.* Gisborne, 5 Utah, 319.

(*d*) (1) *Technical Language, etc.* — Thus, evidence may be given of technical or peculiar usage in order to qualify or explain the language, signs, or abbreviations employed by the parties. Hite *v.* State, 9 Yerger, 357; Keller *v.* Webb, 125 Mass. 88; Callahan *v.* Stanley, 57 Cal. 476; Collender *v.* Dinsmore, 55 N. Y. 200; Ins. Co. *v.* Van Os, 63 Miss. 431; Collingwood *v.* Bank, 15 Neb. 118; King *v.* Merriman, 38 Minn. 47; Atkinson *v.* Sinnott, 67 Miss. 502; Herman *v.* Roberts, 119 N. Y. 37; Farm. & Mech. Bank *v.* Day, 13 Vt. 36; Atlantic R. R. Co *v.* Bank, 19 Wall. 548; Bryan *v.* Harrison, 76 N. C. 360; Craig *v.* Pervis, 14 Rich. Eq. (S. C.) 150; Hightower *v.* Maull, 50 Ala. 495; Scholefield *v.* LeBlond, 2 Rev. de Lég. 77; Jones *v.* Anderson, 76 Ala. 427; Stewart *v.* Smith, 59 Tenn. 231; Caird *v.* Webster, 9 Quebec, 158; Atkinson *v.* Truesdell, 127 N. Y.

230; Garth *v.* Woodbury, 1 L. C. Jur. 43; Myers *v.* Tirbals, 72 Cal. 278; Crockett *v.* Green, 3 Del. Ch. 466; Fahey *v.* Jackson, 7 L. C. R. Q. B. 27; Donley *v.* Tindall, 32 Tex. 43. So of an obscure word, figure, or phrase. Walrath *v.* Whittekind, 26 Kans. 482. But see Ins. Co. *v.* McMillan, 31 Ala. 711.

(2) *Subject-matter.* — So the condition, nature, and qualities of the subject-matter of a statement or agreement may be shown by parol evidence. U. S. *v.* Peck, 102 U. S. 64; Emery *v.* Webster, 42 Me. 204; Elfe *v.* Gadsden, 2 Rich. 373; Seaman *v.* Hogeboom, 21 Barb. 398; Slater *v.* Breese, 36 Mich. 77; Russel *v.* Werntz, 24 Pa. St. 337; Tufts *v.* Greenewald, 66 Miss. 360; Buford *v.* Lonergan, 6 Utah, 301; Altshul *v.* San Francisco, &c., 43 Cal. 171; Keller *v.* Webb, 125 Mass. 88; French *v.* Hayes, 43 N. H. 30; Hotchkiss *v.* Barnes, 34 Conn. 27; Jackson *v.* Perrine, 35 N. J. L. 137; Elliott *v.* Horton, 28 Gratt. 766; Edwards *v.* Tipton, 77 N. C. 222; Bell *v.* Boyd, 53 Ga. 643; Shewalter *v.* Pirner, 55 Mo. 218; Cornwell *v.* Cornwell, 91 Ill. 414; Nilson *v.* Morse, 52 Wis. 240, 247. Such evidence is necessary to identify the subject-matter. Baucum *v.* George, 65 Ala. 259; Doolan *v.* Carr, 125 U. S. 618; Miller *v.* Palmer, 3 U. C. Q. B. o. s. 425; Waterman *v.* Johnson, 13 Pick. 261; Blake *v.* Doherty, 5 Wheat. 359; Storer *v.* Elliot Fire Ins. Co., 45 Me. 175; Reamer *v.* Nesmith, 34 Cal. 624. Or to identify the persons affected by the document. Jay *v.* East Livermore, 56 Me. 107, 120; Coit *v.* Starkweather, 8 Conn. 289; Andrews *v.* Dyer, 81 Me. 104.

(3) *Usage.* — So evidence of any custom or usage — business or otherwise — in reference to which the parties may fairly be supposed to have contracted, is admissible to explain or supplement their language. Robinson *v.* U. S., 13 Wall. 363; Dana *v.* Fiedler, 2 Kernan, 40; Brown *v.* Brooks, 25 Pa. St. 210; Allan *v.* Comstock, 17 Ga. 554; Page *v.* Cole, 120 Mass. 37; Collender *v.* Dinsmore, 55 N. Y. 204; McMasters *v.* R. R., 69 Pa. St. 374; Johnson *v.* Ins. Co., 39 Wis. 87; Collins *v.* Driscoll, 34 Conn. 43. See also § 223, n. 1.

It is of course possible at all times to prove by parol the existence of a paper as a fact in all cases where its contents are not material to the rights of the parties, or where the party proving it does not seek to avail himself of the contents as proof of any fact stated in it, or of any obligation created or discharged by it. Starkie, Ev. 10th ed. *716, n. 1; Gilbert *v.* Duncan, 5 Dutch. 133; Cramer *v.* Shriner, 18 Md. 140; Silsbury *v.* Blumb, 26 Ill. 287.

B. Wills. — (*a*) *Construction.* — In case of wills, as in case of other instruments within the purview of the "parol evidence rule," the duty of the court is one of interpretation, not formation or revision. "Evidence is admissible," it is said, to prove all facts which the rules of the substantive law of wills permit to be proved. Such rules are said to be rules of evidence; strictly speaking, they are not. All evidence will be received in aid of this duty of interpretation, if it assist the court in construing the instrument from the standpoint of the testator, — putting him into possession of material facts enabling him to understand statements with regard to the subjects or objects of the testator's bounty. Bond's Appeal, 31 Conn. 183; Richards *v.* Miller, 62 Ill. 417; Goodhue *v.* Clark, 37 N. H. 525; White *v.* Hicks, 33 N. Y. 383; Warren *v.* Gregg, 116 Mass. 304; Best *v.* Hammond, 55 Pa. St. 409; Tyson *v.* Tyson, 37 Md. 567; Reed *v.* Ins. Co., 95 U. S. 23; Fraim *v.* Millison, 59 Ind. 123; Small *v.* Field, 102 Mo. 104; Rule *v.* Manpin, 84 Mo. 587; Thompson *v.* Gaut, 14 Lea, 310; Lowry *v.* Grant, 7 U. C. Q. B. 125; Rutherford *v.* Morris, 77 Ill. 397; Smith *v.* Smith, 1 Edw. Ch. 189; Wood *v.* White, 32 Me. 340; Gilliam *v.* Chancellor, 43 Miss. 437. *Provided, nevertheless,* that direct statements of intention, *dehors* the instrument, are not in general to be received.

(*b*) *Ambiguities, latent and patent.* — If the court, aided by evidence of all the material circumstances in the case, finds that the language of the testator has failed sufficiently to identify the intended beneficiary or the subject-matter of the bequest, the case is one of patent ambiguity. If, on the other hand, the court, so aided, finds the language of the testator *prima facie* clear and conclusive as to his intent, but that the evidence before it makes doubtful the identity of the person or thing referred to, the ambiguity is latent.

The distinction is based upon a statement of Lord Bacon (Bacon's Max. of Law Reg

23, 25; Bacon's Law Tracts, pp. 99, 100) to the effect that "A latent ambiguity of language may be supplied by averment." Lord Bacon was considering, in the passages cited, the rules of pleading as related to declaring upon an instrument under seal. The rule has been, however, transferred into the law of evidence, — and to the following extent.

(*c*) *Direct Statements of Intent.* — If the ambiguity be patent, it is the duty of the court to declare the instrument *pro tanto* inoperative and void; to hold otherwise would in effect be drawing a new will for the testator. 1 Jarman, Wills, 409. If, on the other hand, the ambiguity be latent, and more especially and commonly if the case be one of equivocation, — *i. e.*, if the description given by the testator applies equally well in all its parts to two persons or things, — the court may call to its aid the further evidence of direct statements by the testator *dehors* the instrument of his intention with regard to the disposition of his property. St. Luke's Home for Indigent Christian Females *v.* Assoc. for the Relief of Respectable Aged Indigent Females, 52 N. Y. 191; Bodman *v.* Amer. Tract Society, 9 All. 447; Tilton *v.* Bible Society, 60 N. H. 377; Senger *v.* Senger, 81 Va. 687; Webster *v.* Morris, 66 Wis. 366; American Tract Soc. *v.* Pratt, 9 All. 109; Tucker *v.* Seaman's Aid Society, 7 Metc. 188; Cleverly *v.* Cleverly, 124 Mass. 314; Pickering *v.* Pickering, 50 N. H. 349; Vernor *v.* Henry, 3 Watts, 393. In Tucker *v.* Seaman's Aid Society, a bequest was made to the "Seaman's Aid Society." Another society of similar objects, the "Seaman's Friend Society," offered evidence that the testator had never heard of the "Seaman's Aid Society;" that, on the contrary, he was deeply interested in the objects of their society, to which he was a frequent contributor; that he had repeatedly expressed his determination to leave it a legacy, and that the scrivener had caused the insertion of the name of the other society by the statement that such was the proper "style" of their society. *Held*, that such evidence was inadmissible, there being no latent ambiguity. See, to the same effect, Wallize *v.* Wallize, 55 Pa. St. 242; Lawrence *v.* Ketchum, 4 Ont. App., Rep. 92.

(*d*) *Other Cases.* — For instances in which the distinction between latent and patent ambiguities has been applied to instruments other than wills, see Bell *v.* Woodward, 46 N. H. 315; Goff *v.* Roberts, 72 Mo. 570; Sargent *v.* Adams, 3 Gray, 72, 77; Bradley *v.* Wash. &c. Co., 13 Peters, 89; Board of Education *v.* Keenan, 55 Cal. 642. That a latent ambiguity may, in case of all instruments, be explained by general parol evidence, see A. *d* (2), of this note, *supra*. Chaplin *v.* Provincial Ins. Co., 23 C. P. U. C. 278; McAdie *v.* Sills, 24 C. P. U. C. 606; Thornell *v.* Brockton, 141 Mass. 151; Strong *v.* Kamm, 13 Oreg. 172; Clay *v.* Field, 138 U. S. 464; Hubble *v.* Cole, 85 Va. 87. See also Hall *v.* Davis, 36 N. H. 569; Bank *v.* Dunn, 6 Peters, 51; Waterman *v.* Johnson, 13 Pick. 261; Piper *v.* True, 36 Cal. 606. But parol evidence of what was intended to be covered by a deed is inadmissible. Greer *v.* Johnston, 32 Q. B. U. C. 77; Wicks *v.* Light Co., 76 Mich. 322.

(*e*) *Rules of Construction.* — The rules which guide the court in construing wills and other instruments do not seem to fall within the law of evidence. See 1 Greenl. Ev. § 301 and notes; Hawkins, Wills, pp. 1–8; 1 Jarman, Wills, 3 Eng. ed. 413; Wigram's Extrinsic Evidence in the Interpretation of Wills. Doe *v.* Taylor, 1 All. 525; Lowry *v.* Grant, 7 Q. B. U. C. 125. Wigram's famous "Seven Propositions," though perhaps not entirely accurate, may still be considered with profit. *Mutatis mutandis*, and the fact that a will is the language of the "testator soliloquizing" taken into consideration, these propositions will largely govern the court in the construction of documents other than wills. I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case, the sense in which he thus appears to have used them will be the sense in which they are to be construed. II. Where there is nothing in the context of a will from which it is apparent that the testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of inten-

tion to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will from which it is apparent that the testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of the testator's words. VI. When the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Prop. VII.) will be void for uncertainty. VII. Notwithstanding the rule of law which makes a will void for uncertainty when the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may thus be defined: where the object of a testator's bounty or the subject of disposition (*i. e.*, the person or thing intended) is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator. Wigram, Wills (2d Amer. ed.), 55–57.

(§ 228) *Custom.* — Evidence of usage is not available to vary the terms of a contract. Cook *v.* Hawkins, 54 Ark. 423; Smythe *v.* Parsons, 37 Kans. 79; Beer *v.* Ins. Co., 39 Oh. St. 109; Bigelow *v.* Legg, 102 N. Y. 652; Scott *v.* Hartley, 126 Ind. 239; DeWitt *v.* Berry, 134 U. S. 306. But where there is no express contract, evidence of general custom is admissible if it throws light on the presumed intent of the parties. McDonnell *v.* Ford, 87 Mich. 198; Stoudenmire *v.* Harper, 81 Ala. 242; Schaub *v.* Brewing Co., 80 Tex. 634; Bradbury *v.* Butler, 1 Col. App. 430; Jonsson *v.* Thompson, 97 N. Y. 642; Brown *v.* Browne, 9 Q. B. U. C. 312. Existence of a custom may be relevant on the question of the power of an agent, Hibbard *v.* Peek, 75 Wis. 619. But on the question of the authority of a section-master to bind the company the custom of other section-masters is immaterial. Couch *v.* R. R., 22 S. C. 557. Whether on a question of negligence, the custom of others similarly situated is admissible seems to be in dispute. That it is admissible, see Sahlien *v.* Bank, 90 Tenn. 221; Nodau *v.* White River Co., 76 Wis. 120. That it is immaterial, see R. R. *v.* Rowland, 82 Tex. 166; Mulcairns *v.* Janesville, 67 Wis. 24. No evidence is admissible of a custom contrary to law. Hardy *v.* Fairbanks, James (Nova Scotia Rep.), 432. The custom must be presumably known to both parties. Chateaugay Co. *v.* Blake, 144 U. S. 476.

The law on this subject was forcibly stated by Judge Story, in case of the "Reeside" (2 Sumn. 567). "The true and appropriate office for usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I appre-

hend it never can be proper to resort to any usage or custom to control or vary the positive stipulation in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

CHAPTER II.

PROOF OF HANDWRITING.[1]

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§ 232. In this chapter it is proposed to consider a species of proof necessarily much resorted to in judicial proceedings, but which presents many difficulties, and has in every age been found a source of embarrassment to legislators, jurists, and practitioners, — the proof of handwriting (*a*). We speak not of cases where the fact that a certain document was written, is proved by eye-witnesses, or by the admissions of parties, or is inferred from circumstances; but of cases where a judgment or opinion that a given document is or is not in the

(*a*) Much of this chapter has been taken from an article by the author, in the "Monthly Law Magazine," vol. 7, p. 120. The rules of the Roman law respecting handwriting are contained in Novel. LXXIII., which, we are told, in the beginning of it, was framed in consequence of the practice of counterfeiting handwriting, and the difficulties of a case which had arisen in Armenia. For the practice of the civilians, the reader is referred to Cujacius in 73 Nov.; Huberus Præl. Jur. Civ. lib. 22, tit. 4, nn. 16 and 20; Voet. ad Pand. lib. 22, tit. 4, n. 11; Mascard. de Prob. Concl. 285, 330, 331; and Oughton, Ordo Judicior. tit. 225. The framers of the Codes Napoléon seem to have been fully sensible of the difficulties attendant on this subject, and while admitting proof of handwriting by comparison, have taken great pains to insure the genuineness of the specimens used for the purpose. Code de Procédure Civile, part. 1, liv. 2, tit. 10, art. 193–213. *De la vérification des écritures.*

[1] See American cases, at p. 238.

handwriting of a given person, is based on the resemblance of the handwriting to, or its dissimilarity from, that of the supposed writer, an acquaintance with which has been formed by means extraneous to that document. This is a species of circumstantial real evidence (*b*), and, like other species of circumstantial evidence, is not secondary to direct. Thus evidence of the nature in question is perfectly receivable, although the writer of the supposed document is not examined to say whether he wrote it (*c*); and this even if he were actually present in court, although the not calling him would of course be matter of strong observation to the jury. A document wholly in the handwriting of a party is said to be an autograph or holograph (*d*); where it is in the handwriting of another person, and is only signed by the party, the signature may be called "onomastic;" where it is signed by a cross or other symbol, "symbolic" (*e*).

§ 233. Abstractedly considered, it is clear that a judgment respecting the genuineness of handwriting, based on its resemblance to or dissimilarity from that of the supposed writer, may be formed by one or more of the following means: 1st, A standard of the general nature of the handwriting of the person may be formed in the mind by having, on former occasions, observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. 2ndly, A person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his. 3rdly, A judgment as to the genuineness of the handwriting to a document may be formed by a comparison instituted between it and other documents known or admitted to be in the handwriting of the party. These three modes of proof — the admissibility and weight of which we propose to consider in their order — have been accurately designated respectively: "Præsumptio ex visu scriptionis;" "Præsumptio ex scriptis olim visis;" and "Præsumptio ex comparatione scriptorum," or "ex scripto nunc viso" (*f*).

§ 234. The rule with respect to proof "ex visu scriptionis" is clear and settled; namely, that any person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of

(*b*) 2 Benth. Jud. Ev. 460.

(*c*) *R.* v. *Hughes*, 2 East, P. C. 1002; *R.* v. *M'Guire*, *Id.*; *The Bank Prosecutions*, R. & R. C. C. 378.

(*d*) 2 Benth. Jud. Ev. 459, 460, 461.

(*e*) *Id.*

(*f*) 3 Benth. Jud. Ev. 598, 599.

that party, is a competent witness to say whether he believes the handwriting of the disputed document to be genuine or not (*g*). The having seen the party write but once (*h*), no matter how long ago (*i*), or having seen him merely write his signature (*k*), or even only his surname (*l*), is sufficient to render the evidence *admissible;* the weakness of it is matter of comment for the jury. Where a person who cannot write is desirous of subscribing his name to a document, another person writes it for him, which signature he identifies by affixing over or near it a mark, usually a cross. Here it is obvious the difficulty of proof is much increased. "In the symbolic mode of signature," observes Bentham (*m*), "whatever security is afforded by the two other modes (viz., against spuriousness pro parte as well as in toto by the holographic, against spuriousness in toto by the onomastic) is manifestly wanting: a cross (the usual mark) made by one man not being distinguishable from a cross made by another, the *real* part of evidence has no place. Recognition, viz., by deportment, is the only way in which this mode of authentication can be said to operate." This is rather too broadly stated. Unless there is something to identify the mark as being that of a particular person, the evidence seems not to be admissible; but otherwise it is impossible to distinguish this in principle from any other form of proof ex visu scriptionis. In one case (*n*), in order to prove the indorsement of a bill of exchange by one A. M., which was indorsed by mark, a witness was called, who stated that he had frequently seen A. M. make her mark, and so sign instruments, and he pointed out some peculiarity. Tindal, C. J., after some hesitation, admitted the evidence as sufficient, and the plaintiff had a verdict. In a court of equity also, where it was sought to prove a debt due by a deceased person to one W. P., and to prevent the debt from being barred by the Statute of Limitations, receipts for interest were produced in the handwriting of the deceased, and signed with the Christian and surname of W. P., having a cross between them; and an affidavit was produced that P. was a marksman, and that the signs or marks on those documents were respectively the mark or sign of W. P. used by him in place of signing his name, — Shadwell, V.-C., thought the proof of the signature sufficient (*o*).

(*g*) *De la Motte's case*, 21 How. St. Tr. 810; *Eagleton* v. *Kingston*, 8 Ves. 473, 474; *Lewis* v. *Sapio*, 1 M. & M. 39; *Willman* v. *Worrall*, 8 C. & P. 380; also *Garrells* v. *Alexander*, 4 Esp. 37.

(*h*) *Willman* v. *Worrall*, 8 C. & P. 380; Ph. & Am. Ev. 692. See also *Warren* v. *Anderson*, 8 Scott, 384.

(*i*) *R.* v. *Horne Tooke*, 25 How. St. Tr. 71, 72; *Eagleton* v. *Kingston*, 8 Ves. 474, per Lord Eldon.

(*k*) *Garrells* v. *Alexander*, 4 Esp. 37; *Willman* v. *Worrall*, 8 C. & P. 380.

(*l*) *Lewis* v. *Sapio*, 1 M. & M. 39, overruling *Powell* v. *Ford*, 2 Stark. 164.

(*m*) 2 Benth. Jud. Ev. 461.

(*n*) *George* v. *Surrey*, 1 M. & M. 516. See per Parke, B., in *Sayer* v. *Glossop*, 12 Jur. 465.

(*o*) *Pearcy* v. *Dicker*, 13 Jur. 997. See also *Baker* v. *Dening*, 8 A. & E. 94; *In the goods of Bryce*, 2 Curt. 325.

§ 235. The practice with reference to the presumption "ex scriptis olim visis" is thus clearly stated by Patteson, J., in the case of *Doe* d. *Mudd* v. *Suckermore* (*p*): "That knowledge" (scil. of handwriting) "may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added aliundè, if the witness be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the *admissibility* of the evidence (*q*). Nor is it absolutely necessary for this purpose that any act should be done or business transacted by the witness in consequence of the correspondence (*r*). "The clerk," says Lord Denman, in *Doe* d. *Mudd* v. *Suckermore* (*s*), "who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me."

§ 236. It seems, however, that, in order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered (*t*). In a case where the question turned on the genuineness of the handwriting on a bill of exchange, purporting to have been accepted by the defendant, the evidence of a witness, who stated that he had seen the defendant write his name several times before the trial, — he having written it for the purpose

(*p*) 5 A. & E. 703, 730. See also *Lord Ferrers* v. *Shirley*, Fitzg. 195; *Cary* v. *Pitt*, Peake's Ev. App. xxxiv.; *Tharpe* v. *Gisburne*, 2 C. & P. 21; *R.* v. *Slaney*, 5 C. & P. 213; *Harrington* v. *Fry*, R. & M. 90; *Layer's case*, 16 How. St. Tr. 205; *Gould* v. *Jones*, 1 W. Blackst. 384; *Middleton* v. *Sandford*, 4 Camp. 34; *Parkins* v. *Hawkshaw*, 2 Stark. 239; *Greenshields* v. *Crawford*, 9 M. & W. 314; *Batchelor* v. *Honeywood*, 2 Esp. 714; *Murieta* v. *Wolfhagen*, 2 Car. & K. 744.

(*q*) Ph. & Am. Ev. 693.

(*r*) *Id.*; 2 Stark. Ev. 514, n. (*m*), 3rd Ed.

(*s*) 5 A. & E. 703, 740.

(*t*) See the judgments of Patteson and Coleridge, JJ., in *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703.

of showing to the witness his true manner of writing it, so that the witness might be able to distinguish it from the pretended acceptance to the bill, — was rejected by Lord Kenyon, as the defendant might, through design, have written differently from his common mode of writing his name (*u*). So where, on an indictment for sending a threatening letter, the only witness called to prove that the letter was in the handwriting of the accused, was a policeman who, after the letter had been received and suspicions aroused, was sent by his inspector to the accused to pay him some money and procure a receipt, in order thus to obtain a knowledge of his handwriting by seeing him write, his evidence was rejected by Maule, J., on the ground that "Knowledge obtained for such a specific purpose, and under such a bias, is not such as to make a man admissible as a *quasi expert* witness" (*x*).

§ 237. It has been made a question whether a witness who, either ex visu scriptionis or ex scriptis olim visis, has acquired a knowledge of the handwriting of a party, but which, from length of time, has partly faded from his memory, may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at nisi prius (*y*); but the correctness of that decision was denied by Patteson, J., in *Doe* d. *Mudd* v. *Suckermore* (*z*); and the propriety of the practice may fairly be questioned.

§ 238. We now proceed to the third part of this subject; namely, whether and under what circumstances it is competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting. By the general rule of the common law, such evidence was not receivable (*a*), — for which three reasons are assigned in our books. First, that the writings offered for the purpose of comparison with the document in question might be spurious; and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried, to determine their genuineness. Nor is this all, — if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on ad infinitum, to the great distraction of the attention of the jury, and delay in the administration of justice (*b*). 2ndly, that the specimens might

(*u*) *Stanger* v. *Searle*, 1 Esp. 14.
(*x*) *R.* v. *Crouch*, 4 Cox, Cr. Cas. 163.
(*y*) *Burr* v. *Harper*, Holt, N. P. C. 420.
(*z*) 5 A. & E. 703, 737.
(*a*) Doe d. *Mudd* v. *Suckermore*, 5 A. & E. 703.
(*b*) Per Coleridge, J., in *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 706, 707; 2 Stark.

not be fairly selected (*c*). 3rdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such a comparison (*d*). As to the last of these objections, it does not seem satisfactory logic to prohibit a jury which can read from availing themselves of that means for the investigation of truth, because other juries might, from want of education, be disqualified from so doing, — if some men are blind, that is no reason why all others should have their eyes put out. Nor is the second objection very formidable, — it is not always easy to obtain unfair specimens; and should such be produced, it would be competent to the opposite party to encounter them with true ones. But there certainly was great weight in the first objection, particularly when taken in connection with the general rules of common-law practice. So long as parties to a suit were allowed to mask their evidence till the very moment of trial, so long would it have been highly dangerous to permit either of them to adduce ad libitum, for the purpose of comparison, a number of supposed specimens of handwriting, which the opposite party, having had no previous notice of the intention to adduce, would not be in a condition either to answer or contradict, — specimens which might not be fairly selected, or even be the handwriting of the party to whom they are attributed. Still, the exclusion of the proof of handwriting by comparison was not satisfactory (*e*). And if any practical means could be devised to secure at least the *genuineness* of the specimens, it ought on every principle to be received; and the legislature in modern times has accordingly taken the matter in hand, as will be shown presently (*f*).

§ 239. There are several common-law exceptions to the rule which excludes proof of handwriting by comparison: the first of which is, that it is competent for the court and jury to compare the handwriting of a disputed document with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer (*g*). The ground of this exception is sometimes said to be, that the documents being already before the jury, to prevent their mentally instituting such comparison would be impossible (*h*); but another and better reason is, that

Ev. 516, 3rd Ed.; *R.* v. *Sleigh*, Surrey Sum. Ass. 1851, per Alderson, B., MS.

(*c*) *Id.*; and per Dallas, C. J., in *Burr* v. *Harper*, Holt, N. P. C. 420.

(*d*) Per Lord Kenyon, C. J., in *Macferson* v. *Thoytes*, 1 Peake, 20; per Dallas, C. J., in *Burr* v. *Harper*, Holt, N. P. C. 420; per Yates, J., in *Brookbard* v. *Woodley*, 1 Peake 20, n. (*a*); per Lord Eldon, C., in *Eagleton* v. *Kingston*, 8 Ves. 474.

(*e*) 2 Stark. Ev. 516, 3rd Ed.; Ph. & Am. Ev. 698.

(*f*) See 17 & 18 Vict. c. 125, ss. 27 and 103, and 28 Vict. c. 18, ss. 8 and 1, *infrà*.

(*g*) *Griffith* v. *Williams*, 1 C. & J. 47; *Doe* d. *Perry* v. *Newton*, 5 A. & E. 514.

(*h*) *Doe* d. *Perry* v. *Newton*, 5 A. & E. 514.

this sort of proof is not open to the dangers to which the comparison of hands is exposed, — namely, the raising collateral issues, and the jury being misled by spurious specimens.

§ 240. Another exception is the case of ancient documents. When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim "Lex non cogit impossibilia" (*i*), allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one (*j*). It is not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In *Roe* d. *Brune* v. *Rawlings* (*k*), the supposed writer had been dead about sixty years; in *Doe* d. *Tilman* v. *Tarver* (*l*), the writing was nearly one hundred years old; and in *Doe* d. *Jenkins* v. *Davies* (*m*), it was eighty-four years old. And how this comparison is to be made is not clearly settled. In Buller's Nisi Prius (*n*), a case is referred to, decided by Lord Hardwicke, in Dec. 1746, where a parson's book was produced to prove a modus. The parson having been long dead, a witness who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the handwriting, &c. In the case of *Sparrow* v. *Farrant* (*o*), Holroyd, J., is reported to have said that in order to make ancient signatures available for this purpose, a witness should be produced who is able to swear, from his having examined several of such signatures, that he has acquired a sufficient knowledge of the handwriting to be able, without an actual comparison, to state his belief on the subject. Subsequent to this, however, came the case of *Doe* d. *Tilman* v. *Tarver* (*p*), which was an action of ejectment, tried in 1824, where, in order to prove that a place called Yard Farm was part of a certain manor, a paper was put in evidence, which had been handed over to the present steward, among other papers and books relating to the manor, by the representatives of the late steward, entitled "An account of E. H." (who appeared by the books and rolls belonging to the manor to have been steward), "receiver of the Isle of Wight estates of the Lady F., for two years ending at Michaelmas, 1727,"

(*i*) Hob. 96.

(*j*) Ph. & Am. Ev. 701; 2 Stark. Ev. 516, 517, 3rd Ed.; B. N. P. 236; *Roe* d. *Brune* v. *Rawlings*, 7 East, 282, n. (*a*); *Doe* d. *Tilman* v. *Tarver*, R. & M. 141; *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703; *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314.

(*k*) 7 East, 282, n. (*a*).

(*l*) R. & M. 141.

(*m*) 10 Q. B. 314.

(*n*) B. N. P. 236.

(*o*) 2 Stark. Ev. 517, n. (*e*), 3rd Ed.; Devon Sp. Ass. 1819.

(*p*) R. & M. 141.

and which contained an entry relative to Yard Farm. In order to prove the handwriting of E. H., "Lord Chief Justice Abbott," says the report, "directed the person producing the paper to compare it with the handwriting of E. H. in other papers belonging to the manor, and to say upon oath whether he believed the writings were by the same person," — adding that this course had once been adopted by Lawrence, J. The observation of Lord Denman on this and some other cases, in *Doe* d. *Mudd* v. *Suckermore* (*q*), that it does not distinctly appear from the reports whether the comparison was made with a standard, formed in the mind of the witness by an inspection of the papers produced, or whether a direct comparison was made in the first instance, seems well founded; and no objection as to the mode of putting the question appears to have been raised by the counsel on either side. It is probable also that the witness examined in the case before Lawrence, J., was a scientific witness, or expert, — the report speaks of him as being accidentally in court at the time.

§ 241. In this state of the authorities, the case of the *Fitzwalter peerage* (*r*) came before the Committee of Privileges of the House of Lords; and we shall state this case somewhat at length, it being one of the most important on the subject of handwriting in general, as well as bearing strongly on the point under consideration. It was a claim to a peerage which had fallen into abeyance in 1756, and the petition was heard in May, 1843. The claimant, in order to prove his case, proposed to put in evidence some family pedigrees, which were produced from the proper custody. They purported to have been made by E. F., who died in 1751. He had stood in the direct line of the claimant's ancestors; so that if those pedigrees could be proved to be of the handwriting of E. F., they would be admissible in evidence for the claimant, as declarations made by a deceased relative of circumstances respecting the state of his family and immediate relatives. It was proposed to prove the handwriting of E. F., by producing from the Prerogative Office his will, which had been already received in evidence for other purposes, and four other documents, which were proved to be of his handwriting; namely, a confidential letter written by him to the steward of his manor; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account-book; and a deed of settlement of property comprised within that manor. These were produced from a closet which contained the claimant's family muniments, including the title-deeds of the manor and property, which then belonged to him in right of his grandmother. It was proved that the deed of settlement had been repeatedly, and very recently, acted upon, and

(*q*) 5 A. & E. 703, 748. (*r*) 10 Cl. & F. 193.

that all the documents had the genuine signature of "E. F." It was next proposed to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter with the signatures to the proved documents; and for this purpose the inspector of franks in the General Post Office, who had had much experience in distinguishing the characters of handwriting, was called. "Being asked," says the report, "if he had examined the signatures of E. F. to three of the documents, the deed, the will, and the appointment of gamekeeper, all of which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of E. F., and to the handwriting of the entries in the account-book, and of queries on the pedigree of the family at the office of the claimant's solicitor; and he considered that, by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were written or signed, that without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which he said were written in a remarkable character." This evidence was objected to by the Attorney-General, on the ground that the witness's knowledge of the handwriting was acquired, not in the ordinary course of business, but from having studied the handwriting for the purpose of speaking to the identity of the writer. In support of the evidence several cases were cited by the claimant's counsel, and among others *Doe* d. *Tilman* v. *Tarver* and *Sparrow* v. *Farrant;* to which it was replied, that the Court of Queen's Bench had become more strict in its practice since those cases, most of which were cases at nisi prius or on the circuits. The pedigree was rejected by the committee as evidence; and Lord Brougham added, that about five years before, the Lord Chief Justice of the Queen's Bench had consulted him on that kind of evidence; and their joint impression was, that if *Doe* d. *Tilman* v. *Tarver* and *Sparrow* v. *Farrant* were correctly reported, they had gone farther than the rule was ever carried. "In the present case," he added, "the Lord Chancellor (Lyndhurst) and himself were clearly of opinion that they ought not to allow a person to say from inspection of the signatures to two or three documents, — two only, the deed and will, being genuine instruments, admitted to be in the handwriting of E. F., — from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not

objected to. A witness was properly allowed to speak to a person's handwriting, from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting." The claimant's counsel having then referred to *Goodtitle* d. *Revett* v. *Braham* (*s*), in which an inspector of franks at the Post Office was admitted to say, as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand, Lord Brougham continued: "Yes, truly; for that is matter of professional skill. But that is no reason for admitting a witness to speak to the real handwriting of a person from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity." A person was then called who said he had been the family solicitor of the claimant for more than thirty years, and prior to that had been clerk to his uncle, who was the family solicitor for forty years; and who, in answer to questions put to him, said that he had acquired a knowledge of the character of the handwriting of E. F., from his acquaintance with a great number of title-deeds, account-books, and other instruments, purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who then held the F. estates. This witness was admitted to prove the handwriting of the pedigree; and he said he believed, and felt no doubt whatever, that the whole of it was in the handwriting of E. F., with the exception of a few words near the bottom, which he pointed out.

§ 242. Since the case of the *Fitzwalter peerage*, the case of *Doe* d. *Jenkins* v. *Davies* (*t*) was decided by the Court of Queen's Bench. At the trial of the cause in 1845, the parish clerk of a parish at Bristol produced the register of that parish for 1761, which contained an entry of a marriage exactly corresponding with a certificate produced, dated 1761, both purporting to be signed by "W. D.," curate. The witness stated that he had been clerk for seven years and a half, and during that time had acquired a knowledge of the handwriting of W. D. from various signatures in the register; and that he believed the signatures to the entry in question in the register, and to the certificate, to be in the handwriting of W. D. This evidence was received by Coltman, J., as proof of the curate's handwriting, and his ruling was affirmed by the court.

§ 243. Considerable difference of opinion, however, prevailed on the question whether it was allowable to prove the handwriting of

(*s*) 4 T. R. 497. (*t*) 10 Q. B. 314.

modern documents by the testimony of witnesses whose judgment as to the character of the handwriting had been formed from specimens admitted to be genuine, and shown to them with a view of enabling them to form such opinion.

The whole subject underwent a complete investigation in the case of *Doe* d. *Mudd* v. *Suckermore* (*u*), in which the rules of evidence respecting handwriting were much discussed; but the court was equally divided in opinion.

§ 244. It was also made a question whether, when a witness had deposed to his belief respecting the genuineness or otherwise of handwriting, it was competent to test his knowledge and credit by showing him other documents, not admissible as evidence in the cause, nor proved to be genuine, and asking him whether they were in the same handwriting as the disputed one (*x*).

§ 245. The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, introduced as a remedy the following middle course in civil cases. Sect. 27 enacts: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." By sect. 103, this enactment applies to every court of civil jurisdiction; and the 28 Vict. c. 18, ss. 1, 8, extends its provisions to criminal cases.

§ 246. In order to *disprove* handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence. It was received by Lord Kenyon and the Court of Queen's Bench, on a trial at bar, in *Goodtitle* d. *Revett* v. *Braham* (*y*); but rejected by the same judge in *Cary* v. *Pitt* (*z*), on the ground that, although he had in the former case received the evidence, he had laid no stress upon it in his address to the jury. Similar evidence, however, was afterwards admitted by Hotham, B., in *R.* v. *Cator* (*a*); and it has also been received in the ecclesiastical

(*u*) 5 A. & E. 703.
(*x*) See *Hughes* v. *Rogers*, 8 M. & W. 123; *Griffits* v. *Ivery*, 11 A. & E. 322; *Young* v. *Honner*, 2 Moo & R. 536.
(*y*) 4 T. R. 497.
(*z*) Peake's Ev. App. xxxiv.
(*a*) 4 Esp. 117.

courts (*b*). But the principal case on the subject is that of *Gurney* v. *Langlands* (*c*), which was an issue directed to try the genuineness of the handwriting to a warrant of attorney, and where an inspector of franks was called as a witness, and asked, "From your knowledge of handwriting, do you believe the handwriting in question to be a genuine signature or an imitation?" This was rejected by Wood, B.; and on a motion for a new trial, Chief Justice Abbott said, "I have long been of opinion that evidence of this description, whether in strictness of law receivable or not, ought, if received, to have no great weight given to it. . . . The other evidence in this case was of so cogent a description as to have produced a verdict satisfactory to the judge who tried the cause; and I can pronounce my judgment much more to my own satisfaction upon a verdict so found, than if this evidence had been admitted, and had produced a contrary verdict. For I think it much too loose to be the foundation of a judicial decision, either by judges or juries." And Holroyd, J., said, "I have great doubt whether this is legal evidence; but I am perfectly clear that it is, if received, entitled to no weight." Bayley and Best, JJ., concurring, the rule was refused. A somewhat similar notion seems to have found its way to Doctors' Commons, where Sir J. Nicholl is reported to have declined the offer of a glass of high power, used by professional witnesses of this kind, to examine the handwriting, and see if the letters were what is commonly termed *painted;* adding that, in his opinion, the fact of their being painted was in itself an extremely trivial circumstance (*d*). This is carrying matters a great way, and farther than is usual in courts of common law, which never reject the artificial aid of glasses or lamps, where they can be of assistance in the investigation of truth. That scientific evidence of the nature in question may, in the language of C. J. Abbott, "be much too loose to be the foundation of a judicial decision," may be perfectly true; but to declare it *inadmissible* as an adminiculum of testimony is rather a strong position. Indeed, its admissibility seems to be recognised in the more recent cases of the *Fitzwalter peerage* (*e*), the *Tracy peerage* (*f*), and *Newton* v. *Ricketts* (*g*); and, according to the present practice, it is generally received without objection. The *Tracy peerage case* also shows that the evidence of persons whose occupation makes them conversant with MSS. of different ages is receivable to prove that a given piece of handwriting is of a particular date.

(*b*) *Saph* v. *Atkinson*, 1 Add. Eccl. R. 216; *Beaumont* v. *Perkins*, 1 Phillim. 78.

(*c*) 5 B. & A. 330.

(*d*) *Robson* v. *Rocke*, 2 Add. E. R. 88, 89. See also *Constable* v. *Steibel*, 1 Hagg. N. R. 61, 62; and *In the goods of Oppenheim*, 17 Jur. 306.

(*e*) 10 Cl. & F. 198.

(*f*) *Id.* 154.

(*g*) 9 H. L. Ca. 262.

§ 247. Whatever may be the relative values of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous (*h*). "On a forgotten matter we can hardly make distinction of our hands" (*i*). "Many persons," it has been well remarked, "write alike; having the same teacher, writing in the same office, being of the same family, — all these produce similitude in handwriting, which in common cases, and by common observers, is not liable to be distinguished. The handwriting of the same person varies at different periods of life: it is affected by age, by infirmity, by habit" (*k*). The two following instances show the deceptive nature of this kind of evidence. The first is related by Lord Eldon, in the case of *Eagleton* v. *Kingston* (*l*). A deed was produced at a trial, purporting to be attested by two witnesses, one of whom was Lord Eldon. The genuineness of the document was strongly attacked; but the solicitor for the party setting it up, who was a most respectable man, had every confidence in the attesting witnesses, and had in particular compared the signature of Lord Eldon to the document with that of pleadings signed by him. Lord Eldon, however, had never attested a deed in his life. The other case occurred in Scotland, where, on a trial for the forgery of some bank-notes, one of the banker's clerks whose name was on a forged note swore distinctly that it was his handwriting, while he spoke hesitatingly with regard to his genuine subscription (*m*). Standing alone, any of the modes of proof of handwriting by resemblance are worth little; in a criminal case nothing, — their real value being as adminicula of testimony. But still, if the defendant does not produce evidence to disprove that which is adduced on behalf of the plaintiff, this raises an additional presumption in favour of the latter. Slight evidence, uncontradicted, may become cogent proof.

(*h*) Huberus, Præl. Jur. Civ. lib. 22, tit. 4, n. 16; Wills, Circ. Ev. 111, 3rd Ed.; and see the judgment of Sir J. Nicholl in *Robson* v. *Rocke*, 2 Add. Eccl. Rep. 79.

(*i*) Twelfth Night, Act 2, Scene 3.

(*k*) Per Adam, *arguendo*, in *R.* v. *Mr. Justice Johnson*, 29 How. St. Tr. 475. See also per Sir J. Nicholl in *Constable* v. *Steibel*, 1 Hagg. N. R. 61. "Literarum dissimilitudinem sæpe quidem tempus facit, non enim ita quis scribit juvenis et robustus, ac senex et forte tremens, sæpe autem et languor hoc facit: et quidem hoc dicimus, quando calami et atramenti immutatio, similitudinis per omnia aufert puritatem." Nov. LXXIII. Præf. See the able article "Autography," in Chambers' Edinb. Journal for July 26, 1845, where it is said: "Men of business acquire a mechanical style of writing which obliterates *all natural characteristics*, unless in instances where the character is so strongly individual as not to be modified into the general mass. In the present day, all *females* seem to be taught after one model. In a great proportion the handwriting is moulded on this particular model, &c. We often find that the style of handwriting is *hereditary*, &c. &c."

(*l*) 8 Ves. 476.

(*m*) *Case of Carsewell*, Glasgow, 1791; cited Burnett's Crim. Law of Scotland, 502; Wills, Circ. Ev. 112, 3rd Ed.

§ 248. Our ancient lawyers appear to have used the expression, "comparison, or similitude of handwriting," in its more proper and enlarged sense; as designating any species of presumptive proof of handwriting by resemblance, — either comparison with a standard previously created in the mind ex visu scriptionis or ex scriptis olim visis, or direct comparison in the modern sense of the word, — and to have considered that any of those modes of proof was admissible in civil, and none of them in criminal cases (*n*). This latter distinction was, however, abandoned in modern times until its partial revival by the Common Law Procedure Act, 1854 (*o*); but since the 28 Vict. c. 18, ss. 1 and 8, it may be looked on as completely at an end.

(*n*) See the note to *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703, 752; and it seems to have been on this principle that the attainder of Algernon Sidney, in 1683, was reversed by statute. His trial and the statute will be found in 9 How. St. Tr. 817, 996.

(*o*) 17 & 18 Vict. c. 125, s. 27; *supra*, § 245.

AMERICAN NOTES.

(§ 232) *Proof of Handwriting.* — In proof of handwriting, as stated in the text, a witness is regarded as an expert competent to testify if he is acquainted with the handwriting of the person in question, — (1) By having at any time seen such person write. Strong *v.* Brewer, 17 Ala. 706; Keith *v.* Lothrop, 10 Cush. 453; Hopkins *v.* Megquire, 35 Me. 78; West *v.* State, 22 N. J. L. 212; Woodford *v.* MacClenahan, 4 Gilm 85; Edelen *v.* Gough, 8 Gill, 87; Hammond *v.* Varian, 54 N. Y. 398; Pepper *v.* Barnett, 22 Gratt. 405; Board *v.* Misenheimer, 78 Ill. 22; Burnham *v.* Ayer, 36 N. H. 182; State *v.* Gay, 94 N. C. 814. That it is not sufficient to have seen a person write once, see Territory *v.* O'Hare, 1 N. Dak. 30; Nelms *v.* State, 91 Ala 97 (2) By receipt, from such person, of written communications purporting to be in his handwriting, either in the usual course of business or in reply to documents written by the witness; *provided* such communications have been acted upon as genuine by the parties, or adopted as such in the regular course of business. Cody *v.* Conly, 27 Gratt. 313; State *v.* Spence, 2 Harr. (Del.) 348; Pearson *v.* McDaniel, 62 Ga. 100; Chaffee *v.* Taylor, 3 All. 598; Gordon *v.* Price, 10 Ired. L. 385; South. Ex. Co. *v.* Thornton, 41 Miss. 216; Reyburn *v.* Belotti, 10 Mo. 597; Empire Manuf. Co. *v.* Stuart, 46 Mich. 482; Campbell *v.* Iron Co., 83 Ala. 351 Ins. Co. *v.* Manning, 3 Col. 224; Fee *v.* Taylor, 83 Ky. 259; Tuttle *v.* Rainey, 98 N. C. 513; Ullman *v.* Babcock, 63 Tex. 68. See also Pinkham *v.* Cockell, 77 Mich. 265, Hoxsie *v.* Empire Co., 41 Minn. 548. See also Rogers *v.* Ritter, 12 Wall. 317; Sill *v.* Reese, 47 Cal. 294; Willson *v.* Betts, 4 Denio, 201. Or (3) being especially skilled in the examination of handwriting, is enabled to decide upon the genuine character of the specimen submitted by means of a comparison of such specimen with fairly selected, undisputed specimens of the alleged handwriting. 1 Greenl. Ev. § 576 *et seq.*; Mrs. Medway's case, 6 Ct. of Claims, 421; State *v.* Ward, 39 Vt. 225; Com. *v.* Eastman *et al.*, 1 Cush. 189, 217; Rose *v.* Bank, 91 Mo. 399; Carter *v.* Jackson, 58 N. H. 156; Bell *v.* Brewster, 44 Oh. St. 690; State *v.* Thompson, 80 Me. 194. So an expert can testify as to resemblance of ciphers. Com. *v.* Nefus, 135 Mass. 533. But see People *v.* Parker, 67 Mich. 222; Matlock *v.* Glover, 63 Tex. 231. Evidence of expert is good even against the evidence of writer as to genuineness. Luce *v.* Coyne, 36 Q. B. U. C. 305. That test is to be applied by the jury, and not by expert, see Foster *v.* Collner, 107 Pa. St. 305; Williams *v.* Conger, 125 U. S. 397. That it may be by expert, see Durnell *v.* Sowden, 5 Utah, 216; Gleeson *v.* Wallace, 4 U. C.

Q. B. 245. That it should be by expert, see State *v.* Koontz, 31 W. Va. 127; Kennedy *v.* Upshaw, 64 Tex. 411; Weaver *v.* Whilden, 33 S. C. 190; Griffin *v.* State, 90 Ala. 596; Walker *v.* Steele, 121 Ind. 436. The standard of comparison must be proved genuine to the satisfaction of the judge. Com. *v.* Coe, 115 Mass. 481, 503; Powers *v.* McKenzie, 90 Tenn. 167; Costelo *v.* Crowell, 139 Mass. 588. Standard must be shown to be genuine. Reid *v.* Warner, 17 L. C. R. 485. That it must be admittedly genuine, see Tunstall *v.* Cobb, 109 N. C. 316.

Comparison of Hands. — The (3) method of proof, commonly called "by comparison of hands," has met with strong opposition, both in England and in this country, from its doubtful value and supposed dangers. 1 Greenl. Ev. § 581 *et seq.;* Randolph *v.* Loughlin, 48 N. Y. 456; Chandler *v.* LeBarron, 45 Me. 534; Jumpertz *v.* People, 21 Ill. 375; Adams *v.* Field, 21 Vt. 256. Conf. Bronner *v.* Loomis, 14 Hun, 341; Pope *v.* Askeu, 1 Ired. 16; Kinney *v.* Flynn, 2 R. I. 319; Hazleton *v.* Union Bank, 32 Wis. 34; Hawkins *v.* Grimes, 13 B. Monr. 258. The weight of authority seems, however, in substantial accord with the present statutory law of England, admitting such evidence. 1 Whar. Ev. § 718; Power *v.* Frick, 2 Grant's Cases, 306; Lyon *v.* Lyman, 9 Conn. 35; State *v.* Hastings, 53 N. H. 452; State *v.* Ward, 39 Vt. 225; McKeo *v.* Barnes, 108 Mass. 344; Van Sickle *v.* People, 29 Mich. 61; Yates *v.* Yates, 76 N. C. 142; Robertson *v.* Miller, 1 McMull. (S. C.) 120; State *v.* Thompkins, 71 Mo. 613; Smith *v.* Fenner, 1 Gall. 170; Singer Manuf. Co. *v.* McFarlane, 53 Ia. 540; Koons *v.* State, 36 Oh St. 195. *Contra,* the following jurisdictions follow the earlier English rule in rejecting proof of handwriting by "comparison of hands." Goodyear *v.* Vosburgh, 63 Barb. 154; Pope *v.* Askeu, 1 Ired. 16; Haycock *v.* Greup, 57 Pa. St. 438; Kernin *v.* Hill, 37 Ill. 209; State *v.* Fritz, 23 La. An. 55; Hanley *v.* Gandy, 28 Tex. 211; Jones *v.* State, 60 Ind. 241; Pierce *v.* Northey, 14 Wis. 9; Hazleton *v.* Union Bank, 32 Wis. 34; Herrick *et al. v.* Swomley, 56 Md. 439, 459; Davis *v.* Fredericks, 3 Mont. 262; Randolph *v.* Loughlin, 48 N. Y. 456; Strother *v.* Lucas, 6 Pet. 763, 767. That other methods should be exhausted first, see Fournel *v.* Duver, 2 Rev. de Lég. 279.

Ancient Documents, etc. — "Comparison of hands" has been allowed without opposition in two instances, — though originally the privilege was confined to the tribunal. (1) In case of "ancient documents," so called, — *i. e.,* documents over thirty years old. Cantey *v.* Platt, 2 McCord, 260; Sweigart *v.* Richards, 8 Pa. St. 436. (2) In case of genuine documents already in the case. Mrs. Medway's case, 6 Ct. of Claims, 421; King *v.* Donahue, 110 Mass. 155; Williams *v.* State, 27 Tex. App. 466; Hammond's case, 2 Greenl. 33; Randolph *v.* Loughlin, 48 N. Y. 456; Henderson *v.* Hackney, 16 Ga. 521; Brobston *v.* Cahill, 64 Ill. 356; Miller *v.* Jones, 32 Ark. 337; Wright *v.* Hessey, 59 Tenn. 42; Moore *v.* U. S., 191 U. S. 270; Wilber *v.* Eicholtz, 5 Col. 240; Abbott *v.* Coleman, 22 Kans. 250. But see Tome *v.* R. R., 39 Md. 36, 90–93; Otey *v.* Hoyt, 3 Jones (N. C.) L. 407, *contra.*

BOOK III.

RULES REGULATING THE ADMISSIBILITY AND EFFECT OF EVIDENCE.

PRIMARY *and* SECONDARY *Rules of Evidence.*

§ 249. THE rules regulating the admissibility and effect of evidence are of two kinds, — PRIMARY and SECONDARY: the former relating to the *quid probandum*, or thing to be proved; the latter to the *modus probandi*, or mode of proving it. They will be considered in two separate Parts.

PART I.

THE PRIMARY RULES OF EVIDENCE.

§ 250. THE PRIMARY rules of evidence may all be ranged under three heads, in which we accordingly propose to examine them:

1. To what subjects evidence should be directed.
2. The burden of proof, or onus probandi.
3. How much must be proved.

These rules, as stated in a former part of this work (*a*), have their basis in universally recognised principles of natural reason and justice, but owe the shape in which they are actually found, and the extent to which they prevail, to the artificial reason and policy of law.

(*a*) Bk. 1, pt. 2, § 111.

CHAPTER I.

TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

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§ 251. Of all rules of evidence, the most universal and the most obvious is this, — that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation.[1] The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. "Frustrà probatur quod probatum non relevat" (*a*).

(*a*) Broom's Maxims, xxix. 4th Ed.; Halk Max. 50. "La liberté d'alléguer et de prouver des faits, ne s'étend pas à toutes sortes de faits indistinctement; mais le juge ne doit recevoir la preuve, que de ceux qu'on appelle pertinens; c'est à-dire, dont on peut tirer des conséquences, qui servent à établir le droit de celui qui allègue ces

[1] For a statement of the American doctrine as to "facts in issue," see p. 251.

§ 252. Evidence may be rejected as irrelevant for one of two reasons: 1st, That the connection between the principal and evidentiary facts is too remote and conjectural. 2nd, That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered. The use of pleadings, or of some analogous statement of the cases of the contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend; consequently, although a piece of evidence tendered might, if merely considered per se, establish a legal complaint, accusation, or defence, yet, as the opposite party has had no intimation beforehand that that ground of complaint, &c., would be insisted on, the adducing evidence of it against him would be taking him by surprise and at a disadvantage. Hence the maxim of pleading, "Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium" (*c*).

The discussion of the admissibility of evidence under the various forms of pleading in particular actions would be wholly inconsistent with the design of this work, and we will therefore confine ourselves to the general question; before proceeding to which, however, it is important to observe that there are certain matters which it is unnecessary to prove, *i. e.*, — 1. Matters noticed by the courts *ex officio;* 2. Matters deemed *notorious.* "Lex non requirit verificare quod apparet curiæ" (*d*). "Quod constat curiæ opere testium non indiget" (*e*).

§ 253. 1. An enumeration of the matters which the courts, in obedience to common or statute law, notice ex officio, would here be out of place (*f*). Suffice it to say generally that, besides noticing the ordinary course of nature, seasons, times, &c., the courts notice without proof various political, judicial, and social matters. Thus, they notice the political constitution of our own government; the territorial extent of the jurisdiction and sovereignty exercised de facto by it; the existence and titles of other sovereign powers; the jurisdiction of the superior courts, and courts of general jurisdiction; the seals of the superior courts, and of many others; the custom or law of the road, that horses and carriages shall respectively keep on the left side, &c., &c. In all cases of this kind, where the memory of

faits; et il doit au contraire rejeter ceux dont la preuve, quand ils seroient véritables, seroit inutile." Domat, Lois Civiles, &c. part. 1, liv. 3, tit. 6, sect 1, § 10.

(*c*) Co. Litt. 303 a. See also 5 Co. 61 a; Jenk Cent. 2, Cas. 64.

(*d*) 9 Co. 54 b.

(*e*) 2 Inst. 662.

(*f*) A large number will be found collected in Tayl. Ev. pt. 1, ch. 2, and 1 Phill. Ev. ch. 10, sect. 1. See also an enumeration of matters judicially noticed in the courts of the United States in Morgan's Best, 408.

a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence (*g*). Thus, if the point at issue be a date, the judge will refer to an almanac (*h*). The *printed* calendar was used for this purpose at least as early as the 9 Hen. VII. (*i*).[1]

§ 254. 2. The law of England is very slow in recognising matters as too notorious to require proof (*k*), and it is not easy to lay down a definite rule respecting them. In *Richard Baxter's case*, in 1685 (*l*), the defendant was charged with having published a seditious libel; and Jefferies, C. J., is reported to have told the jury, "It is *notoriously* known there has been a design to ruin the king and nation; the old game has been renewed, and this" (the defendant) "has been the main incendiary." The iniquity of such a direction as this, supposing it correctly reported, needs no comment. The language of Wilde, C. J., in the case of *Ernest Jones* (*m*), who was indicted for making a seditious speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury that they should take into consideration what they knew of the state of the country and of society generally at the time when the language was used. What might be innoxious at one time, when there was a general feeling of contentment, might be very dangerous at another time, when a different feeling prevailed; but that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words were spoken. And this seems confirmed by a case of *R.* v. *Dowling* decided the same year (*n*).

§ 255. The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, has been shown, in another place, to be a branch of that fundamental principle of our law which requires the best evidence to be adduced (*o*). The rule has obviously no application where the evidence tendered is either *direct*, or, though circumstantial, is *necessarily* conclusive upon the issue. But whether a given piece of *presumptive* evidence is receivable, or ought to be rejected on this ground, is not unfrequently a question of considerable difficulty.

(*g*) 1 Greenl. Ev. § 6, 7th Ed.; Tayl. Ev. § 20, 5th Ed.

(*h*) *Id.*, and see *Tutton* v. *Darke*, 5 H. & N. 647, 649.

(*i*) Hil. 9 H. VII., 14 B. pl. 1.

(*k*) See Introd. pt. 2, § 38.

(*l*) 11 How. St. Tr. 501.

(*m*) Centr. Cr. Court, 1841, MS.

(*n*) MS., cited Arch. Cr. Pl. 147, 15th Ed., Centr. Cr. Court. See further *Moody* v. *The London and Brighton Railw. Co.*, 1 B. & S. 290, 293; *Parker* v. *Green*, 2 *Id.* 299; *Holcombe* v. *Hewson*, 2 Camp. 391

(*o*) Bk. 1, pt. 1, §§ 88, 90, *et seq.*

[1] For the American law of "judicial cognizance," see p. 253.

Some instances illustrative of this have already been given (*p*), to which may be added the following. On a question between landlord and tenant as to the terms on which the premises were held, although it might assist to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would be rejected as too remote (*q*). So in an action for goods sold and delivered, to which the defence was that the sale was subject to a certain condition, it was held not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to that condition (*r*).

But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as *intent* (*s*). Thus on an indictment for uttering a forged bank-note, evidence is admissible that the accused has uttered similar forged notes, &c. (*t*). On an indictment for poisoning one person, evidence is admissible that the accused has previously (*u*) or subsequently (*x*) poisoned other persons. And in *R.* v. *Francis*, where the indictment was for obtaining money by false pretence, it was said to be clear, on principle, that when the fact was proved that the prisoner had done the act charged, and the only remaining question was whether at the time he did it he had a guilty knowledge of the quality of his act, or acted under a mistake, evidence was admissible to show that he was at that time pursuing a course of similar acts, and thereby to raise a presumption that, in the case in question, he was not acting under a mistake (*y*). By statute, three larcenies within six months may be charged in one indictment for larceny (*z*); and on a trial for receiving stolen goods, evidence may be given of any other stolen goods being found in the possession of the accused within twelve months previous (*a*), — evidence of a kind held to be inadmissible at common law in *R.* v. *Oddy* (*b*).

§ 256. One of the strongest instances of the beneficial application of the principle in question is to be found in the rules respecting the admissibility of evidence to character.[1] That the general repu-

(*p*) Bk. 1, pt. 1, § 92.

(*q*) *Carter* v. *Pryke*, 1 Peake, 95. See *Spenceley* v. *De Willott*, 7 East, 110.

(*r*) *Hollingham* v. *Head*, 4 C. B. N. S. 388. Where, in an action against A., to recover the value of work done by the plaintiff to certain houses, on the order of B., the question was whether A. or B. was liable as principal, evidence was held to be admissible to prove that A. had given orders to persons other than the plaintiff, to do work at the same houses. *Woodward* v. *Buchanan*, L. Rep., 5 Q. B. 285.

(*s*) *R.* v. *Weeks*, 1 Leigh & C. 18.

(*t*) *R.* v. *Wylie*, 2 Leach, 983.

(*u*) *R.* v. *Garner*, 3 F. & F. 681.

(*x*) *R.* v. *Geering*, 18 L. J., M. C. 215

(*y*) Per cur., *R.* v. *Francis*, L. Rep., 2 C. T. 128, 131; 43 L. J., M. C. 97, 100.

(*z*) 24 & 25 Vict. c. 96, s. 5.

(*a*) 34 & 35 Vict. c. 112, s. 19.

(*b*) 2 Den. C. C. 264.

[1] For the American doctrine as to "character evidence," see p. 256.

tation and previous conduct of a litigant party or witness is often of immense weight as natural or moral evidence, as tending to raise a presumption that his action or defence is well or ill founded, or that the evidence which he gives is true or false, must be obvious. But, on the other hand, the exposing every man who comes into our courts of justice to have every action of his life publicly scrutinised, would keep most men out of them (*c*). To admit character evidence in every case, or to reject it in every case, would be equally fatal to justice; and to draw the line — to define with precision where it ought to be received, and where it ought to be rejected — is as embarrassing a problem as any legislator can be called upon to solve (*d*).

§ 257. With respect to the character of *parties* to a cause, the law of England meets the difficulty by taking a distinction between cases where their character ought to be supposed to be in issue, and where it ought not. According to the general rule, upon the whole probably a just one, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favourable to one party or disadvantageous to his antagonist (*e*). This principle has been carried so far that, on a prosecution for an infamous offence, evidence of an admission by the accused, that he was addicted to the commission of similar offences, was rejected as irrelevant (*f*).

§ 258. But where the very nature of the proceedings is such as to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it (*g*). Thus, on an indictment for keeping a *common* bawdy-house, or *common* gaming-house (*h*), the prosecutor may give in evidence any acts of the defendant which support the general charge. So, where the issue is whether a party is non compos mentis, proof may be adduced of particular acts of insanity (*i*). In actions for seduction (*k*), the character of the female for chastity is directly in issue, and may be impeached either by general evidence

(*c*) Fost. Cr. Law, 246.

(*d*) Even Bentham, 3 Jud. Ev. 193, admits the difficulties of this subject, and says that some of them seem scarce capable of receiving solution but in the Gordian style.

(*e*) Ph. & Am. Ev. 488-491; 1 Phill. L. 502-508, 10th Ed.; *King* v. *Francis*, 3 Esp. 117, per Lord Kenyon.

(*f*) *R.* v. *Cole*, Mich. 1810, by all the judges; Ph. & Am. Ev. 499; 1 Phill. Ev. 508, 10th Ed.

(*g*) Bull. N. P. 295.

(*h*) *Clark* v. *Periam*, 2 Atk. 339.

(*i*) *Id.* 340.

(*k*) 1 Phill. Ev. 503, 10th Ed.; *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519.

of misconduct, or proof of particular acts of it. So a charge of rape (*l*), or of assault with intent to commit rape (*m*), brings the question of the chastity of the female so far in issue that it is competent to the accused to give general evidence of her previous bad character in this respect; or even to show that she has been criminally connected with himself (*n*), though the authorities are not agreed as to whether, and under what circumstances, he will be allowed to prove particular acts of unchastity committed by her with other men (*o*). And in an action for libel, the carefully considered case of *Scott* v. *Sampson* (*p*) shows that, in mitigation of damages, evidence of the plaintiff's general bad character is admissible, but that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and evidence that the plaintiff was in the habit of committing offences of a like kind, is too remote, and inadmissible.

§ 259. Although in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still in all cases where the direct object of the proceedings is to punish the offence, — such as indictments for treason, felony, or misdemeanour (*q*), — and is not merely the recovery of a penalty (*r*), it is competent to him to defend himself by proof of previous good character, reference being had to the nature of the charge against him. "On a charge of stealing," it is said in a well-known treatise on the Law of Evidence (*s*), "it would be irrelevant and absurd to inquire into the prisoner's loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. Such evidence relates to principles of moral conduct which, however they might operate on other occasions, would not be likely to operate on that which alone is the subject of inquiry; it would not afford the least presumption that the prisoner might not have been tempted to commit the crime for which he is tried, and is therefore totally inapplicable to the point in question."

§ 260. Few subjects are more liable to be misunderstood than character evidence. On an indictment for stealing from A., for

(*l*) Ph. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R.* v. *Martin*, 6 C. & P. 562; *R.* v. *Barker*, 3 C. & P. 589.

(*m*) Ph. & Am. Ev. 489; 1 Phill. Ev. 505, 10th Ed.; *R.* v. *Clarke*, 2 Stark. 244.

(*n*) *R.* v. *Martin*, 6 C. & P. 562; *R.* v. *Aspinall*, 3 Stark. Ev. 952, 3rd Ed.

(*o*) See Tayl. Ev. §§ 336 and 1296.

(*p*) L. R., 8 Q. B. D. 491.

(*q*) 2 Stark. Ev. 304, 3rd Ed.; Ph. & Am. Ev. 490; 1 Phill. Ev. 506, 10th Ed.

(*r*) Ph. & Am. Ev. 488; 1 Phill. Ev 502, 10th Ed. See also *Att.-Gen.* v. *Radloff*, 10 Exch. 84.

(*s*) Ph. & Am. Ev. 490, 491; 1 Phill Ev. 606, 10th Ed.

instance, proof that on other occasions, wholly unconnected with the transaction in question, the accused acted the part of an honest or even liberal and high-minded man, in certain transactions with B. and C., — even assuming that it would, to a certain extent, render improbable the supposition of his having acted with felonious dishonesty towards A., — is too remote and insignificant to be receivable in evidence. The inquiry should be as to his *general* character among those who have known him, with a view of showing that his *general* reputation for honesty is such as to render unlikely the conduct imputed to him. And even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible (*t*). Such is the effect of *Reg.* v. *Rowton*. In this case the prisoner was indicted for indecent assault. Evidence of good character having been given, the prosecution contradicted it by the evidence of a witness, who stated that he knew nothing of the opinion of the neighbourhood, but that his own opinion was that the character of the prisoner was "that of a man capable of the grossest indecency and the most flagrant immorality." It was held by eleven judges against two that such evidence was inadmissible, and (the jury having convicted the prisoner) that the conviction must be quashed (*u*). "It frequently occurs, indeed," says the author last quoted, "that witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience and opinion of his honesty; but when this statement is admitted, it is rather from favour to the prisoner than strictly as evidence of general character" (*x*).

§ 261. Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced (*y*). And although, in a criminal prosecution, evidence cannot in the first instance be given to show that the

(*t*) *R.* v. *Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520, diss.: Erle, C. J., and Willes, J.

(*u*) This case is sharply criticised in Stephen on Evidence, p. 167. "One consequence," it is there said, "of the view taken is that a witness may with perfect truth swear that a man who to his knowledge has been a receiver of stolen goods for years has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbours. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition. *The case is seldom if ever acted on in practice.* The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction." Although the case only indirectly decides the question of evidence of *good* character, it none the less authoritatively decides it.

(*x*) Ph. & Am. Ev. 491; 1 Phill. Ev. 506, 10th Ed.

(*y*) *R.* v. *Murphy*, 19 How. St. Tr. 724; B. N. P. 296; *R.* v. *Clarke*, 2 Stark. 241; *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519.

accused has borne a bad character, still, if he sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony (*z*). In *R.* v. *Wood* (*a*), the prisoner, who was indicted for a highway robbery, called a witness, who deposed to having known him for years, during which time he had, as the witness said, borne a good character. On cross-examination it was proposed to ask the witness whether he had not heard that the prisoner was *suspected* of having committed a robbery which had taken place in the neighbourhood some years before. This was objected to, as raising a collateral issue; but Parke, B., overruled the objection, saying, "The question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." The question was accordingly put, and the prisoner convicted.

But as it is not competent for the accused to show particular acts of good conduct, the prosecutor cannot, in general, go into particular cases of misconduct; the only exception to this rule having been introduced by the statute 6 & 7 Will. 4, c. 111, which enacts that if upon the trial of any person for any subsequent *felony, not punishable with death*, he shall give evidence of his good character, it shall be lawful, in answer thereto, to give evidence of his conviction for a previous *felony* (*b*). And it has been held that a case is equally within this enactment whether the evidence to character was given by witnesses called on the part of the accused, or was extracted by cross-examination from witnesses for the prosecution (*c*). In practice, however, we seldom see evidence adduced to rebut evidence as to character, although perhaps the interests of justice would be advanced if this were done more frequently.

§ 262. Witnesses to the characters of parties are in general treated with great indulgence, — perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses, unless there is some specific charge on which to found a cross-examination (*d*), or at least without giving notice of an intention to cross-examine them if they are put in the box. The judges also discourage the exercise of

(*z*) *R.* v. *Rowton*, 34 L. J., M. C. 57; 1 Leigh & C. 520, *supra*, overruling *R.* v. *Burt*, 5 Cox, Cr. Cas. 284.

(*a*) Kent Sp. Ass. 1841, MS.; and 5 Jurist, 225.

(*b*) A subsequent act, the 14 & 15 Vict. c. 19, s. 9, provided, that if, upon the trial of any person for an offence, such person should give evidence of his good character, it should be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for a previous offence or offences. But this section was repealed by 24 & 25 Vict. c. 95.

(*c*) *R.* v. *Shrimpton*, 2 Den. C. C. 319; 3 Car. & K. 373.

(*d*) *R.* v. *Hodgkiss*, 7 C. & P. 298.

the undoubted right of prosecuting counsel to reply on their testimony (*e*); and the most obvious perjury in giving false characters for honesty, &c., is every day either overlooked, or dismissed with a slight reprimand. But surely this is mercy out of place. If mendacity in this shape is not to be discouraged, tribunals will naturally be induced either to look on all character evidence with suspicion, or to attach little weight to it. Now there are many cases in which the most innocent man has no answer to oppose to a criminal charge but his reputation; and to deprive this of any portion of the weight legitimately due to it, is to rob the honest and upright citizen of the rightful reward of his good conduct. In this, as in many other instances, the old legal maxim holds good, "Minatur innocentes qui parcit nocentibus" (*f*). It has accordingly happened that judges, knowing from experience how little weight is due to the character evidence so often received, have occasionally told juries that character evidence is not to be taken into consideration unless a doubt exists on the other evidence, — a position perfectly true in the sense that if, on the facts, the jury believe the accused guilty, to acquit him out of regard for his good character would be a violation of their oath; but utterly false and illegal, if its meaning be that character evidence is not to be considered until the guilt or innocence of the accused is first determined on the facts. The use of character evidence is to assist the jury in estimating the value of the evidence brought against the accused; and we cannot dismiss this subject without directing attention to the shrewd observations of C. J. Holt (*g*): "A man is not born a knave; there must be time to make him so, nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next."

§ 263. With respect to the character of *witnesses* (*g'*). The *credibility* of a witness is always in issue; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath (*h*). But until recently evidence of particular facts, or particular transactions, could not be received for this purpose; both for the reasons already assigned (*i*), and also because such evidence would raise a collateral issue; *i. e.*, an issue foreign to that which the tribunal is sitting to try (*k*). The witness might indeed be *questioned* as to such facts or transactions,

(*e*) *R.* v. *Stannard*, 7 C. & P. 673. That the right exists, see that case, and the Resolutions of the judges, 7 C. & P. 676, Res 4, and *R.* v. *Whiting*, 7 C. & P. 771.

(*f*) 4 Co. 45 a. See also Jenk. Cent. 3, Cas 54

(*g*) *R.* v. *Swendsen*, 14 How. St. Tr. 596.

(*g'*) See also sections 130 and 644.

(*h*) *R.* v. *Brown*, L. Rep., 1 C. C. 70.

(*i*) §§ 256, 260, 261.

(*k*) 13 How. St. Tr. 211; 16 *Id.* 246–247; 32 *Id* 490–495; B. N. P. 296; Stark. Ev. 237–238, 4th Ed.; *R.* v. *Burke*, 8 Cox, Cr. Cas. 44.

but he was not always bound to *answer;* and if he did, the party questioning was bound to take his answer, and could not call evidence to contradict it (*l*). But the law on this subject was modified as to civil cases by the 17 & 18 Vict. c. 125, s. 25, which enacts, that "A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact, or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, &c., shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." And this provision has since been extended to criminal cases, by the 28 Vict. c. 18, ss. 1 and 6.

§ 264. In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember that the question is whether the evidence offered is relevant *to any of them;* because evidence not admissible in one point of view, or for one purpose, may be perfectly admissible in some other point of view, or for some other purpose. 1. Evidence not admissible to prove some of the issues or matters in question may be admissible to prove others; evidence not admissible *in causâ*, may be most valuable as evidence *extra causam;* and evidence not receivable either in proof of the facts in dispute, or to test the credit of witnesses, &c., may be important as showing the amount of damage sustained by a plaintiff, &c. 2. Evidence not admissible in the first instance may become so by matter subsequent. Thus, in a suit between A. and B., the acts or declarations of C. are primâ facie not evidence against B., and ought to be rejected; but if it be shown that C. was the lawfully constituted agent of B., either generally, or with respect to the special matter in question, his acts or declarations become evidence against his principal. So a litigant party may, by his mode of conducting his case, render that evidence for his adversary which otherwise would not be so. Thus, although a man's own verbal or written statement cannot be used as evidence for him, yet if his adversary puts such a statement in evidence against him, he is entitled to have the whole of it proved; and the jury may estimate the probability of any part of it which makes in his favour. 3. Evidence may be admissible to prove a subalternate principal fact, which might not

(*l*) *Suprà*, bk. 2, pt. 1, ch. 1.

be admissible to prove the immediate fact in issue. This is of course subject to the rule requiring the best evidence; for the connection between the subalternate principal fact and the ultimate evidentiary fact must be as open, visible, and unconjectural in its nature as that between the subalternate principal fact and the fact directly in issue. In all cases, as has been well observed, the ultimate presumption must be connected either mediately or immediately with facts established by proof (*m*).

(*m*) 2 Ev. Poth. 332.

AMERICAN NOTES.

(§ 251) *Facts in Issue.* — The "facts in issue" in any action are those so constituted by the pleadings or the nature of the investigation. Facts which logically and obviously tend to determine the existence, extent, or nature of the right, liability, or disability asserted or denied in such action, are facts relevant to the issue. As stated in the text, *supra*, the only facts which may be proved in trials at law or in equity are facts in issue and facts relevant thereto. Conf. Steph. Dig. Law Ev. 3d ed., art. 1; Schuchardt *v.* Allens, 1 Wall. 359; McAllister's case, 11 Shepl. 139; Moline Plow Co. *v.* Braden, 71 Ia. 141; Haughey *v.* Strickler, 2 W. & S. 411; Tucker *v.* Peaslee, 36 N. H. 167; Jones *v.* Vanzandt, 2 McLean, 596; Hudson *v.* State, 3 Cold. 355; Lightfoot *v.* People, 16 Mich. 507. That the relevancy of evidence may be established after its introduction, see Harris *v.* Holmes, 30 Vt. 352; Moppin *v.* Ætna Axle Co., 41 Conn. 27. It seems unnecessarily confusing to speak of a fact in dispute as a fact in issue.

Relevancy. — Mr. Justice Stephen in his third edition defines relevancy in an unexceptionable manner. Two facts are said to be relevant to each other when so related "that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." (Dig. Law Ev., art. 1.) This is relevancy — in a logical sense. Legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and for reasons of practical convenience demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant, — that is absolutely essential. The fact, however, that it is logically relevant does not insure admissibility; it must also be legally relevant. A fact which "in connection with other facts renders probable the existence" of a fact in issue, may still be rejected, if in the opinion of the judge and under the circumstances of the case it be considered essentially misleading or too remote. Reynolds Ev. § 5. U. S. *v.* Ross, 92 U. S. 281, 284, per Strong, J.; Morrissey *v.* Ingham, 111 Mass. 63; Jones *v.* State, 26 Miss. 247; Hawkins *v.* James, 69 Miss. 274. It is, however, the tendency of modern jurisprudence to admit most evidence logically relevant. Turnbull *v.* Richardson, 69 Mich. 400; Nickerson *v.* Gould, 82 Me. 512. See § 90, *supra*.

Instances of Relevancy. — What is thus relevant will accordingly be found to vary with the facts of the particular case. Thus, the question being whether A. miscarried by violence, previous miscarriage without violence is relevant. Slattery *v.* People, 76 Ill. 217. On a question of negligence, the employment of more men to guard the track after a fire caused by sparks escaping from the company's locomotive, is a relevant fact. Westfall *v.* Erie R. R. Co., 5 Hun, 75. In an action for seduction, the fact that others "kept company" with the prosecutrix, is relevant to the issue. Stinehouse *v.* State, 47 Ind. 17. Where, on an action for an assault, the defence of accident is relied on, the fact that the assaulting party did not visit, inquire after, or in any way interest herself in the injured party, is relevant. State *v.* Alford, 31 Conn. 40. The question being who first began an encounter, threats previously made by either against the other, even if

unknown to the threatened party, are relevant. Wiggins *v.* People, 93 U. S. 465; Stokes *v.* People, 53 N. Y. 164, 174, People *v.* Scroggins, 37 Cal. 676. The question being one of self-defence, the habit of the deceased in carrying dangerous weapons, and his character for violence, are, if known to the defendant, facts relevant to the issue. Horbach *v.* State, 43 Tex. 242. See also Tracy *v.* McManus, 58 N. Y. 257; Smith *v.* Montgomery, 5 Monroe (Ky.), 502; Stolp *v.* Blair, 68 Ill. 541; Darling *v.* Westmoreland, 52 N. H. 401; White *v.* Graves, 107 Mass. 325; Abney *v.* Kingsland, 10 Ala. 355; Harris *v.* Holmes, 30 Vt. 352; McAllister's case, 11 Shep. (Me.) 139, Weidler *v.* Farmers' Bank, 11 S. & R. 134. So on a question of good faith in giving a chattel mortgage, the relative value of debt and mortgaged property is relevant. Ganong *v.* Green, 71 Mich. 1. The question being one of payment, cheques to debtor's order, drawing out funds to pay A., are not relevant in absence of evidence that they ever were in A.'s possession. Lee *v.* Walker, 25 Fla. 149. On a claim for loss of a trunk, said to contain a lease, evidence that the farm alleged to be leased belonged to another is relevant. Thomas *v.* R. R., 14 Q. B. U. C. 389. The question being whether A. wrote a certain anonymous letter, his use of certain uncommon expressions occurring in the letter is relevant. Scott *v.* Crerar, 14 Ont. App. 152. The use of barbed wire fence by other towns is relevant to the question of whether a particular wire is a nuisance. Hillyard *v.* Grand Trunk R. R., 8 Ont. Rep. 583. The question being whether A. turned down a certain road, the fact that his horse turned down the same road soon after has been held relevant. State *v.* Ward, 61 Vt. 153.

On the other hand, the question being whether a certain loan was usurious, previous receipt of usury is irrelevant. Jackson *v.* Smith, 7 Cowen, 717. That A. has drawn several notes in a certain form is irrelevant to the question whether the notes in controversy were drawn in that way. Iron Mt. Bank *v.* Murdock, 62 Mo. 70. The question being one of malpractice, the fact that the physician has never called for his fees is irrelevant. Baird *v.* Gillett, 47 N. Y. 186. The social standing of the parties is irrelevant to a question of breach of contract. Rowland *v.* Dowe, 2 Murphy (N. C.), 347. Conf. also Campbell, Admr. *v.* C., R. I., & P. R. R. Co., 3 Law & Eq. Rep. 153; Sheffill *v.* Van Deusen, 15 Gray, 485; Brooks *v.* Acton, 117 Mass. 204; Mitchell *v.* Sellman, 5 Md. 376; Furbush *v.* Goodwin, 5 Foster, 425; 2 Phill. Ev. p. 476, Cowen & Hill's note, 328. On the question of what a carpenter should receive, what other carpenters receive is immaterial. Noyes *v.* Fitzgerald, 55 Vt. 49. On an issue whether a sale was absolute or conditional, evidence of buyer's solvency is immaterial. Langworthy *v.* Goodall, 76 Ala. 325. In an action for false arrest, evidence of defendant's financial ability is irrelevant on the question of damages. Jordeson *v.* McAdam, 13 L. C. R. 229.

Relevancy not Sole Test of Admissibility. — Logical relevancy is assumed by Mr. Justice Stephen to be the sole rational test of admissibility; that the two, relevancy and admissibility, are or ought to be coextensive and interchangeable terms. This is a mistake. Public policy, considerations of fairness, the practical necessity for reaching speedy decisions, — these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant. All admissible evidence, as has been said *supra*, is relevant; but all relevant evidence is not admissible. A communication to a legal adviser, or a criminal confession improperly obtained, may, undoubtedly, be relevant in a high degree. They are none the less inadmissible. Conf. § 33, n. 1, *supra*. But it may fairly be said in favor of Mr. Justice Stephen's position in the matter that the law of evidence is largely one of exclusions. The fundamental rule seemingly is that all evidence logically probative is admissible. The rules of evidence consist principally of the exceptions to this proposition. In this view the "hearsay rule" is itself an exception, and the exceptions to it — *e. g.*, dying declarations, concerning pedigree, &c. — are simply examples of the general proposition. The existence of such a system of rules is only intelligible historically, keeping in view the controlling peculiarity of English jurisprudence, the presence of the jury, — an unscientific and easily misled tribunal, against whose errors the court was constantly and necessarily alert. The existence of such an associate to the court's work has proved a constantly moulding force on the law of evidence. Many facts and statements which would be of value to a trained and exact mind could not, it was felt, be submitted to an ignorant and accidental body of men, almost sure to be guided by

feeling, or to use evidence admissible for a limited purpose to an extent entirely prejudicial to the cause of justice. In many ways the demands of logic have yielded to those of hard common-sense in the practical every-day administration of justice. See Field's Law of Evidence in British India, p. 23; Phillips & Ames Ev. 219. No one who has noticed the readiness of the average man to credit a reported statement can question the reasons on which the hearsay rule, for example, was established.

Evidence relevant for any purpose must go to the jury. Royal Canadian Bank *v.* Brown, 27 Q. B. U. C. 41. The question what facts are in issue or relevant to facts in issue is in most instances a pure question of substantive law. It is probable that much of the confusion in the law of evidence arises from a failure to notice this fact. In many instances a party offers evidence to prove a fact which, by the rules of pleading or of substantive law, cannot be proved. It is frequently said that "the evidence is inadmissible," — as if such a ruling were one in the law of evidence. The truth is, not that the evidence offered is not perfectly competent to prove the fact, but that the fact itself is not competent, however proved, and that a party will not be allowed to prove such a fact. In this way many if not most of the rules of positive law find themselves transferred into the law of evidence with the natural confusion so caused. See, for example, a question of the measure of damages treated as one of evidence in Hart *v.* R. R., 112 U. S. 331, 343; or a question of the standard of diligence treated in the same way in R. R. *v.* Richardson, 91 U. S. 454, 469; or cases in which it is held that the declarations of an agent or fellow-conspirator have power under certain circumstances to bind the principal or his co-conspirator, see § 519, n. 1 (*f*), *infra*, § 551, n. 1 (*c*).

(§ 253) Judicial Cognizance. — No party is required to furnish evidence concerning any fact of which the court will take judicial notice, — unless and until the court declines to take such judicial notice, or requires that evidence be furnished of such fact. A court of this country will take judicial notice of the following facts: —

(*a*) *Acts of State, &c.* — The existing form of government, State and national; the existence and usual symbols of all sovereign governments recognized by national authority; the official seals of States and State officials, whether domestic or foreign, and all public treaties, proclamations, or other acts of the supreme authority, State or national. Church *v.* Hubbart, 2 Cranch, 187, 238; Griswold *v.* Pitcairn, 2 Conn. 85, 90; U. S. *v.* Johns, 4 Dall. 412, 416, The Santissima Trinidad, 7 Wheat. 283, 335; Womack *v.* Dearman, 7 Port. 513; Lincoln *v.* Battelle, 6 Wend. 475; Cary *v.* State, 76 Ala. 78; U. S. *v.* Palmer, 3 Wheat. 610, 634; Burnett *v.* State of Tennessee, Mart. & Yerg. 133; Walden *v.* Canfield, 2 Rob. (La.) 466; U. S. *v.* Reynes, 9 How. 127; Watson *v.* Walker, 23 N. H. 471, 496. (See also § 485, n. 1, B. I., *infra.*) So judicial notice will be taken of the Chief Executive of the jurisdiction, State and national, under which such court is constituted, his accession, privileges, and signature. Hizer *v* State, 12 Ind. 330; Lindsey *v.* Atty-Gen., 33 Miss. 508; State *v.* Williams, 5 Wis. 308; Jones *v.* Gale's Cur., 4 Martin, 635; Dewees *v.* Colorado Co., 32 Tex. 570; Wells *v.* Company, 47 N. H. 235, 260. So a public proclamation of amnesty by the President of the United States is an act of which all courts of the United States are bound to take notice Armstrong *v.* U. S., 13 Wall. 154. So of legislative journals. Moog *v.* Randolph, 77 Ala. 597.

So the existence and signature of heads of departments, and other chief officers acting under supreme authority, State or national, will be judicially noticed. York, &c. R. R. Co. *v.* Winans, 17 How. 30; Brown *v.* U. S., 91 U. S. 37, 42; Ingram *v.* State, 27 Ala. 17; Major *v.* State, 2 Sneed (Tenn.), 11; People *v.* Johr, 22 Mich. 461; Himmelmann *v.* Hoadley, 44 Cal. 213; Templeton *v.* Morgan, 16 La. An. 438; Walcott *v.* Gibbs, 97 Ill. 118. So judicial notice will be taken, by a State court, of the office of tax collector and other county offices for the time being, with their respective incumbents. Wetherbee *v.* Dunn, 32 Cal. 106; Thielmann *v.* Burg, 73 Ill. 293; Stubbs *v.* State, 53 Miss. 437. But judicial cognizance will not be taken of who are the sheriff's deputies. State Bank *v.* Curran, 10 Ark. 142; Land *v.* Patteson, Minor (Ala.), 14.

(*b*) *Public Laws.* — The common and public statute law of the United States, and the State jurisdiction, if any, under which the court in question is constituted. U. S. *v.* Turner, 11 How 663, 668; Levy *v.* State, 6 Ind. 281; Canal Co. *v.* R. R. Co., 4 G. & J. 1, 63 So also the law of nations is subject of judicial recognition. The Scotia, 14 Wall.

170, 188. So of the law merchant, mercantile customs, and usages. Brown *v.* Piper, 91 U. S. 37, 42. So the Supreme Court of the United States will take cognizance of the public laws and judicial practice of the several States and Territories. Owings *v.* Hull, 9 Pet. 607, 625; Jasper *v.* Porter, 2 McLean, 579, Miller *v.* McQuerry, 5 McLean, 469; Elwood *v.* Flannigan, 104 U. S. 562, 568, R. R Co. *v.* Bank of Ashland, 12 Wall. 226; Renaud *v.* Abbott, 116 U. S. 277. So also, where one State has recognized acts done in pursuance of the laws of another State, its courts will take judicial cognizance of those laws so far as may be necessary to determine the validity of the acts alleged to be done in conformity with them. Carpenter *v.* Dexter, 8 Wall. 513, 531; Graham *v.* Williams, 21 La. An. 594. But courts will not take cognizance of private statutes. Allegheny *v.* Nelson, 25 Pa. St. 332; Leland *v.* Wilkinson, 6 Pet. 317; Bank *v.* Converse, 33 La. An 963. Nor of legislative journals. Grob *v.* Cushman, 45 Ill. 119; Coleman *v.* Dobbins, 8 Ind. 156. But see Prescott *v.* Trustees, 19 Ill. 324. Nor of municipal ordinances or other regulations of local authority. Hassard *v.* Municipality, &c., 7 La. An. 495; Case *v.* Mobile, 30 Ala. 538; Garvin *v.* Wells, 8 Ia. 286; State *v.* Oddle, 42 Mo. 210. Nor of the statute law of another State. Bonnell *v.* Holt, 89 Ill. 71; Neese *v.* Farmers' Ins. Co., 55 Ia. 604. But courts will, it seems, judicially notice powers of a public nature conferred upon a municipal corporation, created by legislative act, though the act is not in terms declared to be public. Fauntleroy *v.* Hannibal, 1 Dillon (U. S.), 118; State *v.* Mayor, 11 Humph. 217; Briggs *v.* Whipple, 7 Vt 15, 18; Case *v.* Mobile, 30 Ala. 538; Prell *v.* McDonald, 7 Kans. 426. Analogous rules prescribe matters of which judicial cognizance is taken by the Canadian courts. Judicial cognizance is taken of public acts of the Provincial legislature, though locally limited. Darling *v.* Hitchcock, 25 Q. B. U. C. 463. Of the divisions of the province. McDonald *v.* Dicaire, 1 Chy. Ch. 34. Of the official gazette. Dubois *v.* Fauteux, 7 R L 430. And of a change of attorney-general recited therein. Simms *v.* R. R., 22 L. C. Jur. 20. So courts will take judicial cognizance of the appointment of one of its officers as judge. Fay *v.* Miville, 2 Rev. de Lég. 333. So of a barrister appointed to the bench. Tremaine *v.* Tonnancour, 2 Rev. de Lég. 471. Of usury laws not relied on as a defence. Girdlestone *v.* O'Reilly, 21 Q. B. U. C. 409.

(*c*) *Seals, &c.* — A court will also, it seems, take judicial cognizance of its own seal and practice; the seal, practice, and judges of all courts of general jurisdiction constituted under the Constitution of the United States or the same authority as itself; the seal of foreign courts of admiralty and prize; and, in certain limited instances, judicial notice will be also taken of the seals of notaries public. Gilliland *v.* Sellers, 2 Oh. St. 223; Lindsay *v.* Williams, 17 Ala. 229, 231; Watson *v.* Hay, 3 Kerr (N. B.), 559; Rodgers *v.* State, 50 Ala. 102; Newell *v.* Newton, 10 Pick. 470; Tucker *v.* State, 11 Md. 322; Delafield *v.* Hand, 3 Johns. 310, 314; Mountjoy *v.* State, 78 Ind. 172; Headman *v.* Rose, 63 Ga. 458; Hangsleben *v.* People, 89 Ill 164. But see Nye *v.* McDonald, S. C., 2 L. C. J. 109. As to admiralty courts, see Story, Confl Laws, § 643, Croudson *v.* Leonard, 4 Cranch, 434; Thompson *v.* Stewart, 3 Conn. 171, 181; Rose *v.* Himely, 4 Cranch, 241, 292.

The seal of a notary public is, it seems, matter of judicial cognizance chiefly, if not solely, in the case of the protest of a foreign bill of exchange. Orr *v.* Lacy, 4 McLean, 243, 247. See also Browne *v.* Bank, 6 S. & R. 484; Chanoine *v.* Fowler, 3 Wend. 173; Porter *v.* Judson, 1 Gray, 175; Yeaton *v.* Fry, 5 Cranch, 335. But the memoranda of a notary, regularly kept, are competent evidence, after his death, of the matters to which they relate Nicholls *v.* Webb, 8 Wheat 326, 337. It seems also that superior courts will take cognizance of who are the justices of inferior tribunals. Ripley *v.* Warren, 2 Pick. 591; Follain *v.* Lefevre, 3 Rob. (La.) 13. A court will take judicial cognizance of its records — Hangsleben *v* People, 89 Ill. 164 — and the signature and duties of its officers. Central Land Co. *v.* Calhoun, 16 W. Va. 361, 375, Wood *v.* Fitz, 10 Martin, 196.

(*d*) *Course of Nature, etc.* — So no proof need be offered of the ordinary course of nature, or the natural and artificial divisions of time. Floyd *v.* Ricks, 14 Ark. 286; Dawkins *v.* Smithwick, 4 Fla. 158; Sprowl *v.* Lawrence, 33 Ala. 674; Dixon *v.* Niccolls, 39 Ill. 372; Floyd *v.* Johnson, 2 Litt. (Ky.) 109, 113; Wilson *v.* Van Leer, 127 Pa. St. 371; R. R. *v.* Ladd, 92 Ala. 287. Allman *v.* Owen, 31 Ala. 167, 171. Sundays, and

other ordinary public fasts and festivals, will be judicially noticed. Sasscer *v.* Farmers' Bank, 4 Md. 409.

(*e*) *Language.* — No proof need be given of the usual meaning of English words. Com. *v.* Kneeland, 20 Pick. 206, 239. So of customary abbreviations. Moseley *v.* Mastin, 37 Ala. 216; Stephen *v.* State, 11 Ga. 225; State *v.* Liquors, 73 Me. 278; Grennan *v.* McGregor, 78 Cal. 258; Weaver *v.* McElhenon, 13 Mo. 89; Kile *v.* Yellowhead, 80 Ill. 208. But slang, catchwords, and other special phrases, must be proved. Baltimore *v.* State, 15 Md. 376. So in Ellis *v.* Park, 8 Tex. 205, the court found themselves unable to judicially know that "St. Louis, Mo.," was in the State of Missouri.

(*f*) *Matters of General Knowledge.* — (1) So judicial notice will be taken of the legal standard of weights and measures, the current coin, or other circulating medium. Daily *v.* State, 10 Ind. 536; U. S. *v.* Burns, 5 McLean, 23; Reid *v.* McWhinnie, 27 Q. B. U. C. 289; U. S. *v.* Fuller, 4 N. M. 358; Gady *v.* State, 83 Ala. 51; Duvall *et al. v.* State, 63 Ala. 12; Mallory *v.* State, 62 Ga. 164; Chesapeake Bank *v.* Swain, 29 Md. 483, 502; Lampton *v.* Haggard, 3 Monr. (Ky.) 149. But not of the market value of the notes of a bank or government at any particular time. Feemster *v.* Ringo, 5 Monr. 336; Modawell *v.* Holmes, 40 Ala. 391. (2) So no proof need be given with regard to matters of public history. U. S. *v.* U. S. Pac. R. R., 91 U. S. 72, 79; Williams *v.* State, 67 Ga. 260; Bonner *v.* Phillips, 77 Ala. 427; U. S. *v.* Coin, 1 Woolw. (U. S.) 217; Bank of Augusta *v.* Earle, 13 Pet. 519, 590; Payne *v.* Treadwell, 16 Cal. 220; Bank *v.* Cheney, 94 Ill. 430; Smith *v.* Speed, 50 Ala. 276, 279; Kelsey *v.* Coe, 37 Conn. 597. But see McKinnon *v.* Bliss, 21 N. Y. 206; Ohio Life Ins. Co. *v.* Debolt, 16 How. (U. S.) 416, 435. So judicial notice will be taken of the abolition of slavery. Ferdinand *v.* State, 39 Ala. 706. (3) So cognizance will be taken of the important geographical divisions or marked geographical features of this country. Mossman *v.* Forrest, 27 Ind. 233; Walker *v.* Allen, 72 Ala. 456; Martin *v.* Martin, 51 Me. 366; Neaderhouser *v.* State, 28 Ind. 257; State *v.* Tootle, 2 Harr. (Del.) 541. Thus, whether the Mississippi at New Orleans be a tidal river, is a matter of which the court will take judicial notice. Peyroux *v.* Howard, 7 Pet. 324, 341. So of particular places within the jurisdiction. Woodward *v.* R. R. Co., 21 Wis. 309; Central Co. *v.* Gamble, 77 Ga. 584; Gilbert *v.* Moline, &c. Co., 19 Ia. 319; Ind. R. R. *v.* Stephens, 28 Ind. 429. (4) And of the political divisions of the country for purposes of general or local government. Story, Eq. Pl. § 24; Vanderwerker *v.* People, 5 Wend. 530; State *v.* Powers, 25 Conn. 48; Ham *v.* Ham, 39 Me. 263; Wright *v.* Phillips, 2 Greene (Ia.), 191; Winnipiseogee Lake Co. *v.* Young, 40 N. H. 420; Ross *v.* Austill, 2 Cal. 183; Peyroux *v.* Howard, 7 Pet. 324, 342; Wright *v.* Hawkins, 28 Tex. 452; Mossman *v.* Forrest, 27 Ind. 233; Martin *v.* Martin, 51 Me. 366; Smitha *v.* Flournoy's Admr., 47 Ala. 345. So judicial cognizance has been taken of prominent geographical facts relating to foreign countries, in so far as such facts fairly may be assumed to be within the knowledge of persons of ordinary intelligence and education. Thus it has been judicially noticed that the Mersey is a tidal river. Whitney *v.* Gauche, 11 La. An. 432. So also in the case of the Peterhoff, Blatch. Prize Cas. 463. (5) As to what minor matters are of general knowledge, there is naturally great diversity of decision. Thus, the accuracy of the photographic process has been recognized. Udderzook's case, 76 Pa. St. 340; Cozzens *v.* Higgins, 1 Abb. Ct. of App. Dec. 451. So the usual method and distance of travel. Hipes *v.* Cochran, 13 Ind. 175; Oppenheim *v.* Wolf, 3 Sandf. Ch. 571; Isaacson *v.* R. R., 94 N. Y. 278; R. R. *v.* Pilgreen, 62 Ala. 305. So of the customary usages of banking and trade. Amer. Nat. Bank *v.* Bushey, 45 Mich. 135, 140; Salomon *v.* State, 28 Ala. 83, 88. So judicial notice has been taken of the variation of the magnetic needle. Bryan *v.* Beckley, 6 Litt. (Ky.) 91, 95. The cases on this head will be found to turn rather on the individual experience of particular judges than on any well-defined rule. King *v.* Gallun, 109 U. S. 99. Courts have taken notice of the contents of the Bible. State *v.* District Board, 76 Wis. 177. That vacant buildings are dangerous. White *v.* Phœnix Ins. Co., 83 Me. 279. That lager beer is a malt liquor. Netso *v.* State, 24 Fla. 363; Tinker *v.* State, 90 Ala. 647. That whiskey is intoxicating. Frese *v.* State, 23 Fla. 178. See also Blatz *v.* Rohrbach, 116 N. Y. 450. Of the course of husbandry, Wetzler *v.* Kelly, 83 Ala. 440; Loeb *v.* Richardson, 74 Ala. 311. Of the principle on which an ordinary ice cream freezer operates.

Brown *v.* Piper, 91 U. S. 37. Of the height of the human body. Hunter *v.* N. Y. R. R., 23 N. E. Rep. 9. Of the nature of cigars. Jacobs' case, 98 N. Y. 98, 113. So of the facts of the almanac. Reed *v.* Wilson, 41 N. J. L. 29; R. R. *v.* Lehman, 56 Md. 209; McIntosh *v.* Lee, 57 Ia. 356; Ecker *v.* Bank, 64 Md. 292; People *v.* Chee Kee, 61 Cal. 404. So a court has taken cognizance that a pile of lumber is likely to attract children to play about it. Spengler *v.* Williams, 6 So. Rep. 613 (Miss.). But courts have refused to take judicial cognizance of the end of the pasture season. Gove *v.* Downer, 59 Vt. 139. Or that gin and turpentine are inflammable. Moseley *v.* Ins. Co., 55 Vt. 142. Or that kerosene is a refined oil. Bennett *v.* Ins. Co., 8 Daly, 471.

A judge, if he is unacquainted with any fact which he is judicially asked to notice, may satisfy his mind on the point by reference to any personal or documentary source. He may even refuse to take such judicial cognizance until satisfied by evidence presented to him for that purpose. U. S. *v.* Teschmaker, 22 How. 392; Wagner's case, 61 Me. 178; Gardiner *v.* The Collector, 6 Wall. 499, 511; Brown *v.* Piper, 91 U. S. 37, 42. Encyclopædias or works of general history are in no sense evidence, *per se*, in the absence of statutory provision. Conf. § 640, *infra*. Also Rev. Stats. U. S. § 908. Their legitimate use, in his discretion, is to satisfy the mind of the court in regard to matters of which he is asked to take judicial notice. A newspaper is evidence to the same extent. Morris *v.* Harmer, 7 Pet. 554; Ashworth *v.* Kittridge, 12 Cush. 193; Whiton *v.* Alb. City Ins. Co., 109 Mass. 24. But see Steph. Dig. Ev., art. 35; Com. *v.* Alburger, 1 Whart. 469. Neither can such works be read to the jury as a matter of right. Stilling *v.* Thorp, 54 Wis. 528. See *ante*.

(§ 256) Character Evidence. — (*a*) *Rule.* — The question being whether A. did or omitted to do a certain act, the fact that A. is of a particular character is not, in general, admissible. Fowler *v.* Ætna Life Ins. Co., 61 Cow. 673, 675; Anderson *v.* Long, 10 S. & R. 55; Jeffries *v.* Harris, 3 Hawks, 105; Battles *v.* Laudenslager, 84 Pa. St. 446; Goldsmith *v.* Picard, 27 Ala. 142; Lander *v.* Seaver, 32 Vt. 114; Thayer *v.* Boyle, 30 Me. 475; Boardman *v.* Woodman, 47 N. H. 120; McDonald *v.* Savoy, 110 Mass. 49; Dudley *v.* McCluer, 65 Mo. 241; American Fire Ins. Co. *v.* Hazen, 110 Pa. St. 530. But see Chamberlain *v.* Torrance, 14 Grant's Ch. R. 181; Wolf *v.* Perryman, 82 Tex. 112.

(*b*) *Exceptions.* — Evidence of character is admissible in the following cases: —

(1) *Criminal Cases.* — In criminal proceedings the accused is permitted to offer evidence of good character. Com. *v.* Webster, 5 Cush. 295, 324, 325; MacDaniel *v.* State, 8 Sm. & M. 401; People *v.* Moett, 23 Hun, 60; Harrington *v.* State, 19 Oh. St. 264; Carter *v.* Com., 2 Va. Cases, 169; State *v.* Merrill, 2 Dev. 269; State *v.* Douglass, 44 Kans. 618; U. S. *v.* Gunnell, 5 Mackay, 196; Hanney *v.* Com., 116 Pa. St. 322; Holsey *v.* State, 24 Tex. App. 35; Mosley *v.* Ins. Co., 55 Vt. 142; Armor *v.* State, 63 Ala. 173; State *v.* Ford, 3 Strobh. 517, n.; Laura Fair's case, 43 Cal. 137; State *v.* Daley, 53 Vt. 442, 446. But see to the effect that such evidence is admissible only in doubtful cases, Bennett *v.* State, 8 Humph. 118; Long *v.* State, 11 Fla. 295. See also Schaller *v.* State, 14 Mo. 502; Soule *v.* Bruce, 67 Me. 584. Such evidence of good character being offered by the accused, the prosecution is permitted to introduce similar evidence of bad character in rebuttal. The prosecution, however, cannot make bad character part of its original case; the initiative must be taken by the accused. 1 Whar. Cr. Law, §§ 636–646; 3 Dane's Ab. c. 84, art. I, § 5; Olive *v.* State, 11 Brown (Neb.), 4, 27; State *v.* Creson, 38 Mo. 372; Felsenthal *v.* State, 30 Tex. App. 675; People *v.* Evans, 72 Mich. 367, 381. But see Williams *v.* State, 74 Ala. 18.

"*Reputation is Character.*" — By "character" in this connection is meant such portion of a man's actual nature and disposition as is relevant to the subject under investigation. The question, for example, being whether homicide was in self-defence, good character for chastity would not be particularly material; good character for quiet disposition would be. State *v.* King, 78 Mo. 555. By an inflexible rule of law, the only admissible evidence of such actual nature and disposition is *general reputation in the community*. 3 Bentham, Jud. Ev. 190, 192; Burrill, Circ. Ev., 2d ed., 527; State *v.* Bloom, 68 Ind. 54; Gandolfo *v.* State, 11 Oh. St. 114; Cunningham *v.* State, 65 Ind. 377; Mynatt *v.* Hudson, 66 Tex. 66; Peterson *v.* Morgan, 116 Mass. 350; Conley *v.* Meeker, 85 N. Y. 618. Logically, and perhaps with advantage (conf. Steph. Dig. Ev., note xxv.), the law might have admitted other evidence of character, *e. g.*: (1) It might have allowed evidence of the

opinion of witnesses as to the disposition of the accused. Or (2) It might have admitted evidence of any particular facts of conduct which would serve as natural indices of disposition. That such evidence is not admissible, see Campbell *v.* Bannister, 79 Ky 205; Kearney *v.* State, 68 Miss. 233; Morgan *v.* State, 88 Ala. 223; King *v.* State, 65 Miss. 576; Campbell *v.* State, 38 Ark. 498; R. R. *v.* Scott, 68 Tex. 694; Jones *v.* Duchow, 87 Cal. 109; Dorsey *v.* Clapp, 22 Neb. 564; Nixon *v.* McKinney, 105 N. C. 23; Jones *v.* State, 76 Ala 8. Where particular acts may be shown, the rebuttal may be by the same kind of evidence. Plummer *v.* Ossipee, 59 N. H. 55. The latter class of evidence, — *i. e.*, proof of disposition by evidence of particular acts, — being, however, admissible to prove facts of disposition in the case of lower animals. Whittier *v.* Franklin, 46 N. H. 23; Lynch *v.* Moore, 154 Mass. 335; Kennon *v.* Gilmer, 5 Mont. 257; People *v.* Lock Wing, 61 Cal. 380; Hogan *v.* State, 76 Ga. 82; Turnpike *v.* Hearn, 87 Tenn. 291; Wormsdorf *v.* Detroit R. R., 75 Mich. 472. Such particular facts of conduct in a human being, as evidentiary of disposition, may be inquired into on cross-examination, when general reputation for bad character has been testified to on the direct examination. Leonard *v.* Allen, 11 Cush. 241, 245. The rule stated above, restricting "character evidence" to general reputation, has perhaps been historically affected by the fact that character evidence in criminal cases is the last remnant of the process of compurgation at present existent in English law. Starkie, Ev. *76, n. (*h*). Rebuttal of character evidence is by general reputation, not by particular acts. Com. *v.* O'Brien, 119 Mass. 342; People *v.* White, 14 Wend. 111. And it must evidently be testimony to his reputation before being charged with the crime alleged. State *v.* Johnson, Winston (N. C.), 151; Wroe *v.* State, 20 Oh. St. 460. As to the time and place in which the reputation must exist to be relevant, much is left to the discretion of the court. State *v.* Potts, 78 Ia. 656; Waddingham *v.* Hulett, 92 Mo. 528; Coates *v.* Sulau, 46 Kans 341; Graham *v.* State, 29 Tex. App. 31; Wallis *v.* White, 58 Wis. 26. That party has no reputation is a competent fact. Bingham *v.* Bernard, 36 Minn. 114.

(2) *Character in Issue.* — If character be in issue directly, or if the fact that a party is of a particular character or reputation be a fact relevant to the issue, as affecting the measure of damages or otherwise, the rule excluding character evidence has no application. Martin *v.* Hardesty, 27 Ala. 458. Thus, in an action for libel or slander, the character of the plaintiff is, according to the weight of authority, a fact relevant to the issue. 1 Whar. Ev. § 53; 2 Starkie, Slander, pp. 77–86, 88, 89–95; Inman *v.* Foster, 8 Wend. 602; Townsend, Lib. and Sl., 3d ed., §§ 32, n., 57, n., 211, 387, 389, 406; Anderson *v.* Long, 10 S. & R. 55; Bodwell *v.* Swan, 3 Pick. 376; Proctor *v.* Houghtaling, 37 Mich. 41; Adams *v.* Lawson, 17 Gratt. 250; Sawyer *v.* Eifert, 2 Nott & McC. 511; Holley *v.* Burgess, 9 Ala. 728; Leonard *v.* Allen, 11 Cush. 241, 245; Schroyer *v.* Miller, 3 W. Va. 158. But see Matthews *v.* Huntley, 9 N. H. 146; Myers *v.* Currie, 22 Q. B. U. C. 470; Stow *v.* Converse, 3 Conn. 325; Houghtaling *v.* Kilderhouse, 1 N. Y. 530, *contra*. So in an action for breach of promise of marriage. Burnett *v.* Simpkins, 24 Ill 264; Van Storch *v.* Griffin, 77 Pa St. 504; McGregor *v.* McArthur, 5 C. P U. C. 493. So in cases of alleged rape, bastardy, or indecent assault, the character of the plaintiff for chastity is relevant to the issue. Impeachment in such cases may extend to particular acts of misconduct. 1 Greenl. Ev. § 54, n.; Low *v.* Mitchell, 6 Shepl. 372; Com. *v.* Kendall, 113 Mass. 210; Conkey *v.* People, 1 Abb Ct. App. Dec. 418; State *v.* Jefferson, 6 Ired. 305; Woods *v.* People, 55 N. Y 515; State *v.* Reed, 39 Vt. 417; State *v* Murray, 63 N. C. 31; Camp *v.* State, 3 Kelly, 417; Sherwin *v* People, 69 Ill. 55; Young *v.* Johnson, 123 N. Y. 226. But see Proctor *v.* Houghtaling, 37 Mich. 41.

(3) *Character for Veracity.* — So also the character of a witness for veracity is always a relevant fact. Evansich *v.* R R, 61 Tex. 24; McDonald *v.* Com., 86 Ky. 10. (See § 644, n. 1, A. *b*, (1).) Character of a witness may be defended when impeached People *v.* Bush, 65 Cal. 129. The method, however, of proving or rebutting such character varies somewhat in different jurisdictions. In certain of the American States the practice is to inquire directly for the *general reputation of the witness for veracity*. See 1 Greenl Ev. § 461; Adams *v.* Greenwich Ins. Co., 70 N. Y. 166; Knode *v.* Williamson, 17 Wall 586; L., N. A, & C. R. W. Co. *v.* Richardson, 66 Ind. 43; Craig *v.* State, 5 Oh. St. 605; Quinsigamond Bank *v.* Hobbs, 11 Gray, 250; Kelly *v.* State, 61 Ala. 19; People *v.* Methvin, 53 Cal 68; French *v.* Sale, 63 Miss. 386; Ford *v.* Ford, 7 Humph. 92; Wike *v.*

Lightner, 11 S. & R. 198; Amidon *v.* Hosley, 54 Vt. 25; Boon *v.* Weathered, 23 Tex. 675; Davis *v.* Franke, 33 Gratt. 413, 425. On the other hand, in England, and in perhaps the majority of jurisdictions in this country, the *opinion* of witnesses as to the veracity of the person to be impeached is inquired for, it being first ascertained that the general reputation of such person for veracity is poor. Anon., 1 Hill (S. C.), 251, 258; Hamilton *v.* People, 29 Mich. 173, 185; State *v.* Boswell, 2 Dev. (N. C.) 209; People *v.* Davis, 21 Wend. 309; Lyman *v.* Philadelphia, 56 Pa. St. 488; Eason *v.* Chapman, 21 Ill. 35; Knight *v.* House, 29 Md. 194, People *v.* Tyler, 35 Cal. 553; Wilson *v.* State, 3 Wis. 798; Stokes *v.* State, 18 Ga. 17; U. S. *v.* Vansickle, 2 McLean, U. S. C. Ct. 219. But a witness cannot be asked to state from the evidence in the case his opinion as to the veracity of a witness. Beasley *v.* People, 89 Ill. 571. For instances in which a wider range of investigation into the *general character* of the witness (not limiting it to *veracity*) has been allowed, see Anon., 1 Hill (S. C.), 251, 258; Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 261; State *v.* Boswell, 2 Dev. Law, 209; Johnson *v.* State, 61 Ga. 305; State *v.* Stallings, 2 Hayw. (N. C.) 300. Lack of chastity cannot be used to impeach the veracity of a female witness. Jackson *v.* Lewis, 13 Johns. 504; Spears *v.* Forrest, 15 Vt. 435; Com. *v.* Churchill, 11 Metc. 538. But see Com. *v.* Murphy, 14 Mass. 387; Com. *v.* Moore, 3 Pick. 194; McCreary *v.* Grundy, 39 Q. B. U. C. 316; U. S. *v.* Bredemeyer, 6 Utah, 143; Teese *v.* Huntingdon, 23 How. 2; Smith *v.* State, 58 Miss. 867, 873. Mere contradiction among witnesses, or proof of contradictory statements, does not admit evidence of good character for veracity. Pruitt *v.* Cox, 21 Ind. 15; Frost *v.* McCargar, 29 Barb. 617; Chapman *v.* Cooley, 12 Rich. L. 654; Vance *v.* Vance, 2 Metc. (Ky.) 581; Saussy *v.* R. R., 22 Fla. 327; Tedens *v.* Schumers, 112 Ill. 263; State *v.* Archer, 73 Ia. 320. See, however, Burrell *v.* State, 18 Tex. 713; Sweet *v.* Sherman, 21 Vt. 23; Hadjo *v.* Gooden, 13 Ala. 718, *contra.*

CHAPTER II.

THE BURDEN OF PROOF.

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§ 265. THE burden of proof,[1] or *onus probandi*, is governed by certain rules, having their foundation in principles of natural reason, to which an artificial weight is superadded by the reason and policy of the law (*a*); and in order to form clear notions on this subject, the best course will be to consider it, first, in the abstract, and afterwards as connected with jurisprudence.

§ 266. Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that what is asserted by the one party is more probable than what is denied by the other, and the means of proof are equally accessible to both, the party who asserts the fact or proposition must prove his assertion, — the burden of proof, or *onus probandi*, lies upon him; and the party who denies that fact or proposition need not give any reason or evidence to show the contrary, until his adversary has at least laid some probable grounds for the belief of it. The reason for this is clear. On all matters which are not the subject either of intuitive or sensitive knowledge, which are either not susceptible of demonstration, or are not demonstrated, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced; and where effective proofs are in the power of a party who refuses or

(*a*) Introd. pt. 2, § 42.

[1] For the statement of the American doctrine as to the "Burden of Proof," see p 268.

neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him. It is obvious that, in a complicated controversy, the burden of proving some of the matters in dispute may rest on one of the parties, while the burden of proving the rest may be on his adversary.

§ 267. One of the causes, as was shown in the introduction to this work, which renders artificial rules of evidence indispensable to municipal law, is the necessity for *speedy action* in tribunals (*b*). In order to do complete justice, tribunals must be supplied by law with rules which shall enable them to *dispose*, one way or the other, of all questions which come before them, — whatever the nature of the inquiry, or however difficult, or even impossible, it may be to get at the real truth. And as the law takes Nature for its model, and works on her basis as far as possible, the best mode of effecting this object is, to attach an artificial weight to the *natural* rules by which the burden of proof is governed, and to enforce its order more strictly than is observed in other controversies. And therefore the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right, or the weakness of proof, in his adversary (*c*). Hence the great principle which has been variously expressed by the maxims, "Actori incumbit onus probandi" (*d*); "Actori incumbit probatio" (*e*); "Actore non probante, reus absolvitur" (*f*); 'Semper necessitas probandi incumbit illi qui agit" (*g*); "Actore non probante, qui convenitur, etsi nihil ipse præstat, obtinebit" (*h*); "Deficiente probatione remanet reus ut erat antequam conveniretur" (*i*), &c. The plaintiff is bound in the first instance to show at least a primâ facie case, and if he leaves it imperfect the court will not assist him: "Melior est conditio rei quàm actoris" (*k*); "Potior est conditio defendentis" (*l*); "In dubio secundùm reum, potiùs quàm secundùm actorem litem dari oportet" (*m*); "In obscuris minimum est sequendum" (*n*), &c. Thus where, in an action for goods sold and delivered by a liquor merchant, the only evidence was that several bottles of liquor, of what kind did not appear, were delivered at the defendant's house, Lord Ellenborough directed the jury to presume that they were

(*b*) Introd. pt. 2, §§ 41, 42.

(*c*) *Midland Railw. Co.* v. *Bromley*, 17 C. B. 372; *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497.

(*d*) 4 Co. 71 b.

(*e*) Hob. 103.

(*f*) Bonnier, Traité des Preuves, §§ 39 & 42.

(*g*) Inst. lib. 2, tit. 20, § 4; Dig. lib. 22, tit. 3, l. 21.

(*h*) Cod. lib. 2, tit. 1, l. 4.

(*i*) Gibert, Corp. Jur. Canon. Prolegom. Pars Post. tit. 7, cap. 2, § 11; No. 7.

(*k*) 4 Inst. 180.

(*l*) Cowp. 343; 8 Wheat. 195.

(*m*) Heinec. ad Pand. Pars 4, § 144.

(*n*) Sext. Decretal. lib. 5, tit. 12; De Reg. Jur. Reg. 31.

filled with the cheapest liquor in which the plaintiff dealt (*o*). So where, in an action for money lent, it appeared in evidence that, the defendant having asked the plaintiff for some money, the plaintiff delivered to him a bank-note, the amount of which could not be proved, — it was held by the Court of Exchequer that the jury were rightly directed to presume it to have been for the note of lowest amount in circulation (*p*). When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he in his turn is bound to show a primâ facie case at least, and if he leaves it imperfect the court will not assist him: "Agere is videtur, qui exceptione utitur: nam reus in exceptione actor est" (*q*); "Reus excipiendo fit actor" (*r*); "In genere quicunque aliquid dicit, sive actor sive reus, necesse est ut probet" (*s*). It is in this sense that the maxim, "Semper præsumitur pro negante" (*t*), and the expression that the law presumes against the plaintiff's demand (*u*), are to be understood. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according to the practice of the court and nature of the case is analogous to pleadings, it may, and frequently does, shift in the course of a trial. On an indictment for libel, for example, to which the defendant pleads simply not guilty, the burden of proof would lie, in the first instance, on the prosecutor. But on proof that the document, the subject of the indictment, contained matter libellous per se, and was published by the defendant's showing it to A. B., the law would presume the publication malicious, and cast on the defendant the onus of rebutting that presumption. And if he were to prove in his defence that it was shown to A. B. under such circumstances as to render it, primâ facie, a confidential communication, the burden of proof would again change sides, and it would lie on the prosecutor to prove malice in fact.

§ 268. In order to determine on which of two litigant parties the burden of proof lies, the following test was suggested by Alderson, B., in *Amos* v. *Hughes* (*x*), in 1835; viz., "*which party would be successful if no evidence at all were given?*" This test was applied by the learned baron in subsequent cases (*y*); and it has been

(*o*) *Clunnes* v. *Pezzey*, 1 Camp 8.

(*p*) *Lawton* v. *Sweeney*, 8 Jur. 964.

(*q*) Dig. lib. 44, tit. 1, l. 1.

(*r*) Bonnier, Traité des Preuves, §§ 152, 320. See also Devot. Inst. Canon. lib. 3, tit. 9, § 2.

(*s*) Matthæus de Prob. c. 8, n. 4.

(*t*) 10 Cl. & F. 534.

(*u*) *Clunnes* v *Pezzey*, 1 Camp. 8

(*x*) 1 Moo. & R. 464. See also the observations of the same judge in *Huckman* v *Fernie*, 3 M. & W. 505, and *Mills* v. *Barber*, 1 *Id.* 425.

(*y*) *Belcher* v. *M'Intosh*, 8 C. & P. 720; *Ridgway* v. *Ewbank*, 2 Moo. & R. 217; *Geach* v. *Ingall*, 14 M. & W. 100.

adopted by other judges at nisi prius (*z*), and frequently recognised by higher tribunals (*a*). As, however, the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus; viz., "which party would be successful if no evidence at all, or no more evidence, as the case may be, were given" (*b*); and this of course depends on the principles regulating the burden of proof. These we now proceed to examine more closely; first observing, however, that in many cases the burden of proof is cast by statute on particular parties (*c*).

§ 269. 1. The general rule is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute, according to the maxim, "Ei incumbit probatio, qui dicit; non qui negat" (*d*), — a rule to which the common-sense of mankind at once assents, and which, however occasionally violated in practice, has ever been recognised in jurisprudence (*e*).

§ 270. Much misconception and embarrassment have been introduced into this subject by some unfortunate language in which the above principle has been enunciated. "Per rerum naturam," says the text of the Roman law, "factum negantis probatio nulla sit" (*f*); and our old lawyers lay down broadly, "It is a maxim in law that witnesses cannot testify a negative, but an affirmative" (*g*). For these and similar expressions it has been rashly inferred, and is frequently asserted, that "a negative is incapable of proof," — a position wholly indefensible if understood in an unqualified sense. Reason and the context of the passage in the Code alike show that by the phrase "per rerum naturam, &c.," nothing more was meant than to express the undoubted truth that, in the ordinary course of things, the burden of proof is not to be cast on the party who merely denies an assertion. The ground on which this rests has been already explained (*h*); and another grave objection to requiring proof of a simple negative is its

(*z*) *Osborn* v. *Thompson*, 2 Moo. & R. 254; *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 C. & P. 735.

(*a*) *Barry* v. *Butlin*, 2 Moo. P. C. C. 484; *Leete* v. *The Gresham Life Insurance Society*, 15 Jur. 1161, &c. See the judgment in *Doe* d. *Caldecott* v. *Johnson*, 7 Man. & Gr. 1047.

(*b*) See *Baker* v. *Batt*, 2 Moo. P. C. C. 317, 319.

(*c*) See a large number collected in Tayl. Ev. § 345 *et seq.*; also 17 & 18 Vict. c. 104, s. 169; 23 & 24 Vict. c. 22, s. 30; 24 & 25 Vict. c. 98, ss. 9, 10, 11, 16, & 17; and c. 99, ss. 6, 7, 8, &c.

(*d*) Dig. lib. 22, tit. 3, l. 2; 1 Stark. Ev. 418, 3rd Ed.; 586, 4th Ed.; Ph. & Am. Ev. 827.

(*e*) Voet. ad Pand. lib. 22, tit. 3, n. 10; Vinnius, Jurisp. Contract, lib. 4, c. 24; Domat, Lois Civiles, part. 1, liv 3, tit. 6, sect. 1, §§ 6 & 7; Bonnier, Traité des Preuves, § 29; Co. Litt. 6 b; 2 Inst. 662; Gilb. Ev. 145, 4th Ed; Stark. Ev. 585–587, 4th Ed. See some other old authorities, *supra*, bk. 1, pt. 2 § 111, n. (*g*).

(*f*) Cod. lib. 4, tit. 19, l 23.

(*g*) Co. Litt 6 b; 2 Inst. 662 See also 4 Inst. 279, and F. N. B. 107.

(*h*) *Supra*, § 268.

indefiniteness. "Words," says L. C. B. Gilbert (*i*), "are but the expressions of facts; and therefore when nothing is said to be done, nothing can be said to be proved." "Negativa nihil implicat" (*k*); "Negativa nihil ponunt" (*l*). A person asserts that a certain event took place, not saying when, where, or under what circumstances; how am I to *disprove* that, and convince others that at no time, at no place, and under no circumstances, has such a thing occurred? "Indefinitum æquipollet universali" (*m*). The utmost that could possibly be done in most instances would be to show the improbability of the supposed event; and even this would usually require an enormous mass of presumptive evidence. Hence the well-known rule that affirmative evidence is in general better than negative evidence (*n*). But when the negative ceases to be a *simple* one, — when it is qualified by time, place, or circumstance, — much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.

§ 271. But here two things must be particularly attended to: First, not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations (*o*); and, secondly, to remember that the affirmative and negative of the issue mean the affirmative and negative of the issue in *substance*, and not merely its affirmative and negative in *form* (*p*). With respect to the former: if a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does *not* exist, or that a particular thing is insufficient for a particular purpose, and such-like, — these, although they resemble negatives, are not negatives in reality; they are, in truth, positive averments, and the party who makes them is bound to prove them. Thus, in an issue out of Chancery, directed to inquire whether certain land assigned for the payment of a legacy was deficient in value, where issue was joined upon the deficiency, the one party alleging that it was deficient, and the other that it was not, — it was held by the court (Holt, C. J., presiding), that though the averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined the issue that the

(*i*) Gilb. Ev. 145, 4th Ed.

(*k*) 30 Ass. pl. 5; Long. Quint. 22 A.

(*l*) 18 Edw. III. 44 B. pl. 50.

(*m*) 1 Vent. 368. See also Branch, Max. "Propositio indefinita, &c."

(*n*) 8 Mod. 81; 2 Curt. Eccl. Rep. 434; Wills, Circ. Ev. 224, 3rd Ed.; Stark. Ev. 867, 4th Ed.

(*o*) *Berty* v. *Dormer*, 12 Mod. 526; *Harvey* v. *Towers*, 15 Jur. 544, 545, per Alderson, B.

(*p*) See *infrà*, § 272.

land was not of value, and the other had averred that it was, the proof then had lain on the other side (*q*). So, in an action of covenant against a lessee, where the breach is, in the language of the covenant, that the defendant did not leave the premises in repair at the end of the term, the proof of the breach lies on the plaintiff (*r*).

§ 272. Again, as already mentioned, the incumbency of proof is determined by the affirmative in *substance*, not the affirmative in *form* (*s*). "Quis sit affirmans, vel negans non tam ex verborum figurâ, quam eorum sententiâ reique naturâ colligitur" (*t*). *Amos* v. *Hughes* (*u*) and *Soward* v. *Leggatt* (*x*) well illustrate this. In *Amos* v. *Hughes* (*u*), which was an action of assumpsit on a contract to emboss calico in a workmanlike manner, the breach was, that the defendant did not emboss the calico in a workmanlike manner, but, on the contrary, embossed it in a bad and unworkmanlike manner; to which the defendant pleaded that he did emboss the calico in a workmanlike manner; on which issue was joined. Alderson, B., said that questions of that kind were not to be decided by simply ascertaining on which side the affirmative in point of form lay; that supposing no evidence was given on either side, the defendant would be entitled to the verdict, for it was not to be assumed that the work was badly executed; and consequently that the onus probandi lay on the plaintiff. In *Soward* v. *Leggatt* (*x*), which was an action of covenant on a demise, whereby the defendant covenanted to repair and paint a house, the plaintiff alleged as breaches that the defendant did not repair or paint the house, and the defendant pleaded that he did. On these pleadings each party claimed the right to begin, — contending that the burden of proof lay on him; and Lord Abinger, C. B., said, "Looking at these things according to common-sense, we should consider what is the substantive fact to be made out, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases a party, by a little difference in the drawing of his pleadings, might make it either affirmative or negative, as he pleased. I shall endeavour, by my own view, to arrive at the substance of the issue." And he held that the plaintiff had the right to begin, as the burden of proof lay on him.

(*q*) *Berty* v. *Dormer*, 12 Mod. 526.

(*r*) Ph. & Am. Ev. 828; *Harvey* v. *Towers*, 15 Jur. 544, 545, per Platt, B. See also *Croft* v. *Lumley*, 6 H. L. C. 672.

(*s*) *Amos* v. *Hughes*, 1 Moo. & R. 464; *Ridgway* v. *Ewbank*, 2 Moo. & R. 217; *Smith* v. *Davies*, 7 C. & P. 307; *Soward* v. *Leggatt*, *Id.* 613; *Jefferies* v. *Clare*, 2 M. & W. 43, 46, per Alderson, B.

(*t*) Huberus, Positiones Juris, sec. Pand. lib. 22, tit. 3, n. 10. See ad id. Struvius, Syntag. Jur. Civ. Exercit. 28, § vi. and Vinnius, Jurisp. Contract, lib. 4, cap. 24.

(*u*) 1 Moo. & R. 464.

(*x*) 7 C. & P. 613.

§ 273. 2. The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a primâ facie case against a party. When a presumption is in favour of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favour of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative. The subject of presumptions in general will be treated in the Second Part of the present Book (*y*).

§ 274. 3. There is a third circumstance which may affect the burden of proof; namely, the capacity of parties to give evidence. "The law," says one of our old books (*z*), "will not force a man to show a thing which by intendment of law lies not within his knowledge." "Lex neminem cogit ostendere quod nescire præsumitur" (*a*). From the very nature of the question in dispute all or nearly all the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while the requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant (*b*). Thus where, in an action by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant offered to set off some cash notes issued by the bankrupt, payable to bearer, and bearing date before his bankruptcy, it was held that the defendant was bound to show that they came into his hands before the bankruptcy (*c*).

§ 275. 4. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the

(*y*) *Infrà*, pt. 2, ch. 2.

(*z*) Plowd. 46. See ad id. Plowd. 54–55, 123, 128, 129; Finch, Law, 48; 9 Co 110; and T. 13 Edw. II. 407, tit Covenant.

(*a*) Lofft. M. 569.

(*b*) Ph. & Am. Ev. 829, *R.* v. *Burdett*, 4 B. & A. 95, 140, per Holroyd, J.; *Dickson* v. *Evans*, 6 T. R. 57, 60; 3 R. R. 119, per Ashhurst, J.; *Calder* v. *Rutherford*, 3 B & B. 302; *Sunderland Marine Insurance Company* v. *Kearney*, 16 Q. B. 925.

(*c*) *Dickson* v. *Evans*, 6 T. R. 57.

extent to which it ought to be carried. In *R.* v. *Turner* (*d*), Bayley, J., says, "I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." But in *Elkin* v. *Janson* (*e*), Alderson, B., on this dictum being quoted, said, "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." And in *R.* v. *Burdett* (*f*), Holroyd, J., states in the most explicit terms that the rule in question "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened, by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

§ 276. If this be the true principle, as it probably is, there are some cases in the books which seem to go much beyond it. At the head of these stand various decisions on the game laws (*g*), and especially *R.* v. *Turner* (*h*), — which was a conviction by two justices under the stat. 5 Ann. c. 14, sect. 2 (*i*), against a carrier, for having game in his possession; and where the Court of King's Bench held it sufficient, if the qualifications in the 22 & 23 Car. 2, c. 25, sect. 3, were negatived in the information and adjudication, although they were not negatived by the evidence. This decision was based altogether on the rule under consideration, and on the argument ab inconvenienti, that the defendant must know the nature of his qualification if he had one; whereas the prosecutor would be obliged, if the burden of proof were cast upon him, to negative ten or twelve different heads of qualification enumerated in the statute, — which the court pronounced to be next to impossible. So, in *The Apothecaries Co.* v. *Bentley* (*k*), — which was an action for a penalty under the 55 Geo. 3,

(*d*) 5 M. & S. 206, 211.

(*e*) 13 M. & W. 655, 662.

(*f*) 4 B. & A. 95, 140.

(*g*) Several of them are referred to in *R.* v. *Turner*, 5 M. & S. 206.

(*h*) 5 Man. & S. 206.

(*i*) This statute was repealed by the 1 & 2 Will. 4, c. 32; by the 42nd section of which, however, it is *declared* and enacted, that it shall not be necessary in any proceeding against any person under that Act to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, &c., or other matter of exception or defence, shall be bound to prove the same.

(*k*) Ry. & Mood. 159.

c. 94, for practising as an apothecary, without having obtained the certificate required by that act, — it was held, that the *onus probandi* that the defendant had obtained his certificate, lay upon him. But the principle of these decisions is not of universal application. This appears from the case of *Doe* d. *Bridger* v. *Whitehead* (*l*), — which was an ejectment by a landlord against a tenant, on an alleged forfeiture by breach of a covenant in his lease, to insure against fire in some office in or near London, in which it was contended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument ab inconvenienti was strongly urged, — viz., that the plaintiff could not bring persons from every insurance office in or near London, to show that no such insurance had been effected by the defendant; and *R.* v. *Turner*, *The Apothecaries Co.* v. *Bentley*, and some other cases of that class were cited. But Lord Denman, C. J., in delivering judgment, said (*m*): "I do not dispute the cases on the game laws which have been cited; but there the defendant is, in the first instance, shown to have done an act which was unlawful unless he was qualified; and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge; but that does not vary the rule of law." And in the same case, Littledale, J., said (*n*): "In the cases cited as to game, the defendant had to bring himself within the protection of the statutes; and a like observation applies to *The Apothecaries Co.* v. *Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff." And this ruling has been upheld by subsequent cases (*o*).

It should be noticed, moreover, that the Summary Jurisdiction Acts of 1848 and 1879 (11 & 12 Vict. c. 43, s. 14, and 42 & 43 Vict. c. 49, s. 39, sub-sect. 2) dispense, in summary proceedings, with proof by informants or complainants of "any exemption, exception, proviso, excuse, or qualification" which would be in favour of defendants.

§ 277. It remains to add that the difficulties attending the application of this principle to criminal charges have been felt in the United States of America as well as here, as appears from the case of *The Commonwealth* v. *Thurlow* (24 Pick. 374), which was an indictment for selling spirituous liquors without licence. The court,

(*l*) 8 A. & E. 571.
(*m*) *Id.* 575.
(*n*) *Id.* 576.
(*o*) See *Toleman* v. *Portbury* (in Cam. Scac.), *L. Rep.*, 5 Q. B. 288; *Wedgwood* v. *Hart*, 2 Jur. N. S. 288; *Price* v. *Worwood*, 4 H. & N. 512.

without deciding the general question, were of opinion that the prosecutor was bound to produce primâ facie evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside.[1]

[1] This point has since been settled otherwise in Massachusetts by Acts of the Legislature. Stat. 1844, ch. 102; 1864, ch. 121; Pub. Stats. ch. 214, sect. 12; Holmes *v.* Hunt, 122 Mass. 505, 517. In the United States generally the courts have decided that, where in a criminal case the fact of a license or other justification is one particularly within the power and knowledge of the defendant, he will be required to show the same. Lovell *v.* Payne, 30 La. Ann. pt. i. 511; R. R. *v.* Bacon, 30 Ill. 347; Wheat *v.* State, 6 Wis. 455; State *v.* Morrison, 3 Dev. 299; Haskell *v.* Com., 3 B. Mon. 342; State *v.* Crowell, 12 Shepl. 171; Shearer *v.* State, 7 Blackf. 99. To the opposite effect, see State *v.* Evans, 5 Jones (N. C.), 250. So in civil actions to recover for the price of liquors sold, the plaintiff is required to show that he is licensed to sell. Bliss *v.* Brainard, 41 N. H. 256; Solomon *v.* Dreschler, 4 Minn. 278; Kane *v.* Johnston, 9 Bosw. (N. Y.) 154. To the contrary effect that illegality in such a sale is an affirmative defence to be proved by the defendant, see Wilson *v.* Meloni, 13 Gray, 73; Craig *v.* Proctor, 6 R. I. 547.

AMERICAN NOTES.

(§ 265) *Burden of Proof.* — Like the Latin "*onus probandi*," the English "burden of proof" fails to convey a precise idea, because the term is often interchangeably employed in two entirely distinct senses. That in many cases this is done unconsciously in no way lessens the confusion which arises from transferring reasoning entirely applicable to the phrase in one sense to its use in another. As commonly used, "burden of proof" means, — (*a*) The burden of *establishing a case*, whether by a preponderance of the evidence, or beyond a reasonable doubt; and (*b*) The duty or necessity of *introducing evidence*, either to establish such a case, or to meet an adverse amount of evidence sufficient to constitute a *prima facie* case.

(*a*) *Burden of Establishing.* — The burden of establishing remains throughout the entire case exactly where the pleadings originally place it. *It never shifts.* The party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue has this burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whomever introduced, is all in, if he has not, by the preponderance of evidence required by law, established his position or claim, the decision of the tribunal must be adverse to such pleader. 1 Greenl. Ev. §§ 74–81 (*c*); 1 Whar. Ev. §§ 353–371; Blanchard *v.* Young, 11 Cush. 341, 345; McClure *v.* Pursell, 6 Ind. 330; Seavy *v.* Dearborn, 19 N. H. 351; Wilder *v.* Cowles, 100 Mass. 487; Southworth *v.* Hoag, 42 Ill. 446; Heinemann *v.* Heard, 62 N. Y. 448, 455; Gizler *v.* Witzel, 82 Ill. 322; Oaks *v.* Harrison, 24 Ia. 179; Pusey *v.* Wright, 31 Pa. St. 387, 394; McKinnon *v.* Burrows, 4 U. C. Q. B. o. s. 71; Royal Ins. Co. *v.* Schwing, 87 Ky. 410; Scott *v.* Wood, 81 Cal. 398; Wright *v.* Wright, 139 Mass. 177; R. R. *v.* Stewart, 13 Lea, 432; Starratt *v.* Mullen, 148 Mass. 570; Estate of Ehle, 73 Wis. 445; Fraser *v.* Roche, 7 L. C. R. 472. That evidence is uncontradicted is, however, no ground for following it. Quock Ting *v.* U. S., 140 U. S. 417. The burden may be fixed by statute. Com. *v.* Minor, 88 Ky. 422; R. R. *v.* Crider, 91 Tenn. 489; People *v.* Turner, 117 N. Y. 227. But see Tolson *v.* Coasting Co., 6 Mackey, 39; Penitentiary Co. *v.* Gordon, 85 Ga. 159.

(1) *Negative Allegations.* — It is immaterial that the affirmative of the issue involves proof of negative allegations. Conf. U. S. *v.* Haywood, 2 Gall. 485, 498; Greany *v.* R. R., 101 N. Y. 419; Hartwell *v.* Root, 19 Johns. 345; King *v.* Colvin, 11 R. I. 582; Ames *v.* Snider, 69 Ill. 376; Smith *v.* Zent, 59 Ind. 362; Com. *v.* Locke, 114 Mass. 288; Conyers *v.* State, 50 Ga. 103; Strickler *v.* Burkholder, 47 Pa. St. 476; Kerr *v.* Freeman, 33 Miss. 292.

(2) *Criminal Cases.* — The rule is the same in criminal cases. The burden throughout the trial is on the government to establish the affirmative of the issue; to wit, that the defendant is guilty as charged. If, on the whole evidence, by whichever side introduced, the jury have a reasonable doubt of such guilt, the burden of the government has not been discharged. Shafer *v.* State, 7 Tex. Ct. App. 239, 242. See Com. *v.* McKie, 1 Gray, 61, per Bigelow, J.; see also Com. *v.* Eddy, 7 Gray, 583; State *v.* Jones, 50 N. H. 370; People *v.* Garbutt, 17 Mich. 9; State *v.* Crawford, 11 Kans. 32; Fife *v.* Com., 29 Pa. St. 429, 439; 1 Greenl. Ev., §§ 34, 35; Jones *v.* State, Reported, Jan. 3, 1883, p. 27. *Contra,* People *v.* Schryver, 42 N. Y. 1.

(3) *Proceedings not by the Common Law.* — When there are no pleadings strictly so called, this burden of establishing a case rests on whoever claims the active intervention of law in his behalf. Thus, an executor has throughout the burden of establishing the validity of a will offered for probate. Crowninshield *v.* Crowninshield, 2 Gray, 524, 528; Comstock *v.* Hadlyme, 8 Conn. 254; Ware *v.* Ware, 8 Greenl. 42.

(*b*) *Burden of Evidence.* — Burden of proof, in the sense of "the burden of introducing evidence," is analogous to the phrase in its (*a*) sense, but analogous only. It rests, not, as before, on the one party designated by the pleadings, but on the party, whether plaintiff or defendant, against whom the tribunal, at the time when the question is to be determined, would give its judgment, *no further evidence being introduced.* Before evidence is gone into, it rests on the party who has the affirmative of the issue. After evidence is gone into, as the tribunal will only give its judgment in favor of a *prima facie* case, the burden of introducing evidence is always on the party who has to meet such *prima facie* case. Com. *v.* Choate, 105 Mass. 451; Veiths *v.* Hagge, 8 Ia. 163; Burton *v.* Blin, 23 Vt. 151; Heinemann *v.* Heard, 62 N. Y. 455; Fullerton *v.* Bank, 1 Pet. 604, 607; Kendell *v.* Brownson, 47 N. H. 186; Briceland *v.* Com, 74 Pa. St. 463; Davidson *v.* Nicholson, 59 Ind. 411; Reeve *v.* Ins. Co., 39 Wis. 520; Karst *v.* R. R., 23 Minn. 401; Ketchem *v.* Express Co., 52 Mo. 390; Hutchins *v.* Hamilton, 34 Tex. 290; Lehman Bros. *v.* McQueen, 65 Ala. 570.

(1) *This Burden shifts.* — The "burden of proof," in the (*b*) sense of "burden of evidence," may shift constantly, as evidence is introduced by one side or the other, — as one scale or the other preponderates over its fellow. To carry out the same metaphor: so often and so long as the scale containing an adverse amount of evidence preponderates to a certain extent by reason of evidence adduced in that behalf, the duty or necessity rests on a party to introduce opposing evidence which shall restore the equipoise, or if possible strike a new balance. This necessity or duty may, and usually does, alternate constantly between the parties. This is the "burden of evidence," — burden of proof in its (*b*) sense. But when the entire evidence is in, it is legally necessary to conviction or other affirmative action by the tribunal that the final balance should be one way, that a certain one of the scales should eventually preponderate, and preponderate to a definite extent. This necessity has not at any time shifted, but has remained constantly, throughout the trial, on one of the parties alone; to wit, on him who had the affirmative of the issue. This is the "burden of establishing," — burden of proof in its (*a*) sense. Smith *v.* Gillum, 80 Tex. 120; Crowninshield *v.* Crowninshield, 2 Gray, 524, 529; Jones *v.* Simpson, 116 U. S. 609; conf. 1 Whar. Ev. § 357. To state the same matter in another form, the party whose case requires proof of an evidentiary fact has the burden of introducing evidence to prove that fact. State *v.* Hirsch, 45 Mo. 429; Clements *v.* Moore, 6 Wall. 299, 315; Frech *v.* R. R., 39 Md. 574; Southworth *v.* Hoag, 42 Ill. 446. If, however, such proof lies particularly in the knowledge of the adverse party, it has been held that the latter has the burden of disproving the allegation. Bliss *v.* Brainard, 41 N. H. 256; Wheat *v.* State, 6 Mo. 455; Solomon *v.* Dreschler, 4 Minn. 278; Welsh *v.* State, 11 Tex. 368; Williams *v.* People, 121 Ill. 84; Great West. R. R. Co. *v.* Bacon, 30 Ill. 347; Ford *v.* Simmons, 13 La. An. 397.

(2) *Presumptions.* — It is in this connection, perhaps more strongly than in any other, that the force of a so-called "presumption of law" becomes evident. It is usual to say that a presumption of law "shifts the burden of proof." See § 273, *infra.* This is true, — correctly understood. It shifts the "burden of evidence," — the burden of going forward with new evidentiary matter. Presumptions of fact are of varying weight; *i. e.,* their

value in evidence is indeterminate. Certain of these presumptions of fact, however, the law, for purposes of its own, sometimes arbitrarily, and sometimes logically, *assumes* accurate in the absence of rebutting evidence. As to the point covered by such presumption, the law assumes that a *prima facie* case has been made out. It is the duty of the judge so to rule and so to charge the jury. Now, as has been said, the burden of introducing evidence is on him who has to meet a *prima facie* case. The establishment, therefore, by the one party, in discharge of this *onus*, of a legal presumption casts on the other the burden of disproving it; in other words, it shifts the burden of evidence. When conflicting evidence on the point covered by the presumption of law is actually gone into, the presumption of law is *functus officio* — as a presumption of law. The presumption of fact upon which such legal presumption was founded is to be weighed by the tribunal with the other evidence in the case. See Bliss *v.* Brainard, 41 N. H. 256; Wheat *v.* State, 6 Mo. 455; State *v.* Arnold, 13 Ired. Law, 184; Wilcox, Gibbs, & Co. *v.* Henderson, 64 Ala. 535; Walker *v.* Detroit Transit Ry. Co., 47 Mich. 338. (Conf. § 296, n. 1, A. (*b*), *infra*.)

(3) *Right to open and close.* — The right to begin and close the case is not, perhaps, strictly speaking, involved in the question of the burden of proof. It is rather a rule of practice. Thus, in Massachusetts, the plaintiff always begins and closes. In the majority of cases, however, it follows the "burden of establishing." 1 Greenl. Ev. §§ 74–76; Jones *v.* Kennedy, 11 Pick. 124, 132; Paige *v.* Osgood, 2 Gray, 260; Scott *v.* Hull, 8 Conn. 296; Norris *v.* Ins. Co., 3 Yeates, 84; Gaul *v.* Fleming, 10 Ind. 253. But see Seavy *v.* Dearborn, 19 N. H. 351. Conf. § 637, *infra*. For some consideration of which party has the burden of proof in particular issues, see 1 Whar. Ev. §§ 358–370.

CHAPTER III.

HOW MUCH MUST BE PROVED.

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§ 278. THE just and reasonable principle that tribunals should look to the meaning rather than to the language of the pleadings, or other statements of litigant parties, is not confined to the burden of proof, but extends to the proof itself. The rule of law from the earliest times has been that it is sufficient if the issues raised are proved *in substance* (*a*). This is in truth only a branch of a still more general principle, which runs through every rational system of jurisprudence, — "Lex rejicit superflua" (*b*); "Superflua non nocent" (*c*); "Utile per inutile non vitiatur" (*d*).

§ 279. The most obvious application of this rule is in the case of averments and statements wholly immaterial. All averments which might be expunged from the record, without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only encumber the record, and the proof of them would be as irrelevant as themselves (*e*). And there can be no doubt that the same principle applies to allegations and statements made otherwise than in formal pleadings.

(*a*) Litt. ss. 483, 484, 485; Co. Litt. 227 a, 281 b, 282 a; Hob. 73, 81; 2 Rol. 41–42; Trials per Pais, 140, Ed. 1665; 1 Phill. Ev. 558, 10th Ed.; 1 Stark. Ev. 431, 3rd Ed.; *Id.* 625, 4th Ed. For earlier authorities see bk. 1, pt. 2, § 111, n. (*g*).

(*b*) Jenk. Cent. 3, Cas. 72.

(*c*) Jenk. Cent. 4, Cas. 74; Cent. 8, Cas. 41.

(*d*) Co. Litt. 3 a, 227 a, 379 a; 3 Co. 10 a; 10 Co. 110 a; Hob. 171; 2 Saund. 369; 1 Stark. Ev. 432, 3rd Ed.; *Id.* 625, 4th Ed. "Non solent, quæ abundant, vitiare scripturas:" Dig. lib. 50, tit. 17, l. 94. "Utile non debet per inutile vitiari:" Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. Reg. 37.

(*e*) 1 Phill. Ev. 558, 567, 568, 10th Ed.; 1 Stark. Ev. 432, 3rd Ed.; *Id.* 626, 4th Ed.

§ 280. But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things which he was not bound to allege or prove, but which, when alleged or proved, put his case out of court (*f*). Thus where, before the 15 & 16 Vict. c. 76, s. 64, a party, in giving express colour, stated a *true* title in his adversary instead of a defective one, the latter was entitled to judgment on the pleader's own showing (*g*). It is accordingly a rule that averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials (*h*). "Let an averment of this kind," says an eminent authority on evidence (*i*), "be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the identity of that which is material."

§§ 281–283 (*j*). This rule does not merely absolve from proof of irrelevant matter. It has a far more general application, and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. The books contain many instances of the effect of this rule (*k*). Thus, in an action on a bond, a plea of *solvit ad diem* is supported by proof of payment *ante diem* (*l*); for the payment, so as to save the penalty, is the matter in issue. In an action against a tenant for waste in cutting down a certain number of trees, proof that the defendant cut down a less number maintains the issue (*m*). Although in actions on contracts the contract must be correctly stated, and proved as laid, yet every day's practice shows that in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort it is generally sufficient to prove a substantial portion of the trespasses or grievances complained of.

§ 284. The rule in question is not confined to civil cases (*n*). It is a principle running through the whole criminal law that it is sufficient to prove so much of an indictment as charges the

(*f*) 1 Edw. V., 3 pl. 5; Keilw. 165 b, pl. 2; Plowd. 32, 84; Finch, Law, 65; and *Lush* v. *Russell*, 5 Exch. 203.

(*g*) Steph. Plead. 245, 5th Ed.

(*h*) 1 Stark. Ev. 443, 3rd Ed.; Ph. & Am. Ev. 853; 1 Phill. Ev. 567, 10th Ed.; *Webb* v. *Ross*, 5 Jur. N. S. 126, 127, per Martin, B.

(*i*) 1 Stark. Ev. 443, 3rd Ed.

(*j*) These sections have been abridged in the present edition by the omission of certain passages from Littleton and Coke.

(*k*) For other instances, to be found in the old books, see 2 Rol. Abr. 681, Evidence (D).

(*l*) Ph. & Am. Ev. 846; 1 Phill. Ev. 559, 10th Ed.

(*m*) Co. Litt. 282 a; Ph. & Am. Ev. 847.

(*n*) Co. Litt. 282 a; Ph. & Am. Ev. 849; 1 Phill. Ev. 562, 10th Ed.

accused with a substantive crime (*o*). And what averments in an indictment are so separable and divisible from the rest that want of proof of those averments shall not vitiate the whole, forms an important head of practice. For instance, on an indictment for burglary and stealing goods in the house, the averments of breaking and stealing are divisible, so that if the burglary be not proved, the accused may be convicted of larceny (*p*); as he also may on a charge of robbery, where it appears that the taking was not with violence (*q*). And on an indictment for murder, the accused may be (and often is) convicted of manslaughter; for the substance of the offence charged is the felonious slaying, — malice aforethought being only an aggravation (*r*).

By several modern statutes, also, a like principle has been extended to various offences not actually charged in the indictment. Thus, by 24 & 25 Vict. c. 100, s. 60, a person indicted for child murder may, though acquitted of the murder, be convicted of the misdemeanour of concealing the birth of the child; by 14 & 15 Vict. c. 100, s. 9, a person charged with any felony or misdemeanour may be found not guilty of the felony or misdemeanour charged, but guilty of an attempt to commit the same; by 24 & 25 Vict. c. 96, s. 41, any person charged with robbery may be found guilty of an assault with intent to rob; by 24 & 25 Vict. c. 96, s. 72, any person indicted for embezzlement, or fraudulent application or disposition, &c., may be found guilty of larceny and *vice versâ*.

§§ 285–291 (*s*). But although the law is thus liberal in looking through mere form, in order to see the real substance of the questions raised, a positive *variance* or discrepancy between a pleading and the proof adduced in support of it was for a long time fatal,— a rule considered necessary, to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare. This principle, however salutary in itself, was carried too far, and the consequence was that the best causes were continually lost through variances of the most unimportant kind.

The attention of the legislature was at length turned to this subject; and the present reformed system of procedure was gradually led up to by a long series of statutes. Thus by 9 Geo. 4, c. 15, power was given to judges when any variance appeared between any matter in writing or in print produced in evidence, and the recital thereof upon the record whereon the trial was pending, to cause the record

(*o*) 1 Phill. Ev. 562, 10th Ed.; *R.* v. *Hunt*, 2 Camp. 583.

(*p*) 1 Hale, P. C. 559.

(*q*) *Id.* 534, 535; *Harman's case.*

(*r*) Bro. Ab. Corone, pl. 221; Co. Litt. 282 a; Gilb. Ev. 269, 4th Ed.

(*s*) These sections have been abridged in the present edition by abstracting statutes instead of setting them out at length.

to be forthwith amended in such particular; the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 222, empowered any judge sitting at nisi prius at all times to amend all defects and errors in any proceeding in civil causes, whether there should be anything in writing to amend by or not, and whether the defect or error should be that of the party applying to amend or not; and finally, by the rules of the Supreme Court (*t*), "the court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

The 9 Geo. 4, c. 15, extended to trials for misdemeanours, but the Common Law Procedure Acts and the Judicature Acts are restricted to civil cases. Amendment in criminal cases generally is provided for by 11 & 12 Vict. c. 46, s. 4, and 14 & 15 Vict. c. 100, s. 1. The former of these acts empowers any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court.

A far greater alteration has been effected by 14 & 15 Vict. c. 100. This statute enacts, in its first section, that "Whenever on the trial of any indictment for any felony or misdemeanour, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any place mentioned in the indictment, or in the name or description of any person therein stated to be the owner of any property, which shall form the subject of any offence charged therein, or in the name or description of any person therein stated to be injured by the commission of such offence, or in the name or description of any matter therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person."

(*t*) R. S. C. Ord. XXVII. Rule 1.

PART II.

THE SECONDARY RULES OF EVIDENCE.

§ 292. THE SECONDARY rules of evidence, as has been already stated, are those rules which relate to the *modus probandi*, or mode of proving the matters that require proof (*a*), and for the most part only affect evidence *in causâ* (*b*). The fundamental principle of the common law on this subject is, that THE BEST EVIDENCE MUST BE GIVEN, — a maxim the general meaning of which has been explained in a former part of this work (*c*). In certain cases, however, peculiar forms of proof are either prescribed or authorised by statute. We propose to treat the whole matter in the following order: —

1. Direct and circumstantial evidence.
2. Presumptive evidence, presumptions, and fictions of law.
3. Primary and secondary evidence.
4. Derivative evidence in general.
5. Evidence supplied by the acts of third parties.
6. Opinion evidence.
7. Self-regarding evidence.
8. Evidence rejected on grounds of public policy.
9. Authority of res judicata.
10. Quantity of evidence required.

(*a*) *Suprà*, § 249.
(*b*) Bk. 1, pt. 1, § 86.
(*c*) Bk. 1, pt. 1, §§ 87 *et seq.*

CHAPTER I.

DIRECT AND CIRCUMSTANTIAL EVIDENCE.

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§ 293. ALL judicial evidence is either *direct* or *circumstantial.*[1] By "direct evidence" is meant when the principal fact, or factum probandum, is attested *directly* by witnesses, things, or documents. To all other forms the term "circumstantial evidence" is applied; which may be defined, that modification of *indirect* evidence, whether by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact or factum probandum to be receivable as evidentiary of it. And this also is of two kinds, *conclusive* and *presumptive*: "conclusive," when the connection between the principal and evidentiary facts — the factum probandum and factum probans — is a *necessary* consequence of the laws of nature; as where a party accused of a crime shows that, at the moment of its commission, he was at another place, &c.; "presumptive," when the inference of the principal fact from the evidentiary is only *probable*, whatever be the degree of persuasion which it may generate (*a*).

§ 294. As regards *admissibility*, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and that, by analogy to the principle which excludes second-hand and postpones secondary evidence (*b*), it ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise, and a little reflection will show the difference between the cases. Second-hand and secondary evidence are rejected, because they derive their force from something kept back, the non-production of which affords a presumption that it would, if

(*a*) Introd. pt. 1, § 27.

(*b*) See *infrà*, cc. 4 & 3.

[1] For the American doctrine of circumstantial evidence, see p. 280.

produced, make against the party by whom it is withheld. But circumstantial evidence, whether conclusive or presumptive, is as *original* in its nature as direct evidence: they are distinct modes of proof, acting, as it were, in parallel lines, wholly independent of each other. Suppose an indictment against A. for the murder of B., the apparent cause of death being a wound given with a sword. If C. saw A. kill B. with a sword, his evidence of the fact would be *direct*. If, on the other hand, a short time before the murder, D. saw A. walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed, saw him returning with the sword bloody, these *circumstances* are wholly independent of the evidence of C., — they derive no force whatever from it, — and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt. Besides, the rule that facts are provable by circumstances as well as by direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering, or making away with witnesses and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence that the law would receive against them was contained in a few easily ascertained depositories. Still, the non-production of direct evidence which it is in the power of a party to produce, is matter of observation to a jury (*c*), as indeed is the suppression of any sort of proof. And here it is essential to observe, that the process of reasoning evidencing any fact, principal or subalternate, may be more or less complex, longer or shorter. The inference may be drawn from one evidentiary fact, or from a combination — usually, although perhaps not very accurately, termed a *chain* (*d*) — of evidentiary facts (*e*). Again, the facts from which the inference is drawn may be either themselves proved to the satisfaction of the tribunal, or they may be merely consequences, necessary or probable as the case may be, of other facts thus proved (*f*).

§ 295. Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an

(*c*) 1 Stark. Ev. 578, 3rd Ed.; *Id.* 874, 4th Ed.; 2 Ev. Poth. 340; 3 Benth. Jud. Ev. 230.

(*d*) "It has been said that circumstantial evidence is to be considered as a *chain*, and each piece of evidence as a link in the chain; but that is not so, for then, if one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength." Per Pollock, C. B.; in *Reg.* v. *Exall*, 4 F. & F. 922, 929.

(*e*) 3 Benth. Jud. Ev. 223.

(*f*) 2 Ev. Poth. 332; 3 Benth. Jud. Ev. 3.

indirect mode of proving that which otherwise might not be provable at all (*g*). Hence a given portion of credible direct evidence must ever be superior to an equal portion of credible presumptive evidence *of the same fact.* But in practice it is from the nature of things impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts forming a body of presumptive proof may well bear comparison. When proof is direct, as, for instance, where it consists of the positive testimony of one or two witnesses, the matters proved are more proximate to the issue, or, to speak correctly, are identical with the physical facts of it, and consequently leave but two chances of error,—namely, those which arise from mistake or mendacity on the part of the witnesses; while in all cases of merely presumptive evidence, however long and apparently complete the chain, there is a third, —namely, that the inference from the facts proved may be fallacious (*h*). Besides, there is an anxiety felt for the detection of crimes, particularly such as are very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts, and tribunals to draw rash inferences; and there is also natural to the human mind a tendency to suppose greater order and conformity in things than really exists, and likewise a sort of pride or vanity in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment (*i*). Sometimes, also, hasty and erroneous conclusions, in such cases, are traceable to indolence or an aversion to the patient and accurate consideration of minute and ever-varying particulars (*j*). Accordingly, the true meaning of the expressions in our books, that all presumptive evidence of felony should be warily pressed, admitted cautiously, &c., is not that such evidence is incapable of producing a degree of assurance equal to that derivable from direct testimony; but that tribunals should, in dealing with presumptive evidence, be upon their guard against the peculiar dangers just described. Such are its disadvantages. But then, on the other hand, a chain of presumptive evidence has some decided advantages over the direct testimony of a limited number of witnesses. These are thus clearly stated by Bentham (*k*): "1. By including in

(*g*) Gilb. Ev. 157, 4th Ed.; *R.* v. *Burdett*, 4 B. & A. 95, 123; Theory of Presumptive Proof, p. 55.

(*h*) 3 Benth. Jud. Ev. 249; Ph. & Am. Ev. 459; Bonnier, Traité des Preuves, § 637.

(*i*) Bacon, Nov. Organ. Aphor. 45; *R.* v. *Hodge*, 2 Lew. C. C. 227, per Alderson, B.; Ph. & Am. Ev. 459; Burrill, Circ. Ev. 207. See further, *infrà*, sect. 3, sub-sect. 2.

(*j*) Burrill, Circ. Ev. 207.

(*k*) 3 Benth. Jud. Ev. 251–252. See also Paley's Moral Philosophy, bk. 6, ch. 9.

its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with, the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved; for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognisance of the judge. 2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts, more or less considerable in number, will have been brought forward by so many different deposing witnesses. But the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient, the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his purpose. But where to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted."

Lest too much reliance should be placed on these considerations, it is important to observe that circumstantial evidence does not always consist either of a large number of circumstances, or of circumstances attested by a large number of witnesses; and also that the more trifling any circumstance is in itself, the greater is the probability of its being inaccurately observed and erroneously remembered (*l*). But after every deduction made, it is impossible to deny that a conclusion, drawn from a process of well-conducted reasoning on a mass of evidence purely presumptive, may be quite as convincing, and in some cases far more convincing, than one arising from a limited portion of direct testimony (*m*).

(*l*) 19 How. St. Tr. 74, n.

(*m*) 1 East, P. C. 223; *Annesley* v. *The Earl of Anglesea*, 17 How. St. Tr. 1430, per Mounteney, B.; Paley's Moral Philosophy, bk. 6, ch. 9.

AMERICAN NOTES.

(§ 293) *Circumstantial Evidence.* — With reference to the supposed closeness of an evidentiary statement to the fact to be ultimately proved by it, a distinction is taken between evidence which is direct and that which is circumstantial. Direct evidence may be defined as the testimony of a witness to the existence or non-existence of the fact or facts in issue; circumstantial evidence, as the testimony of a witness to the existence or non existence of facts which usually attend, or in the ordinary course of events render probable, the existence or non-existence of facts in issue. The distinction seems of slight practical value. It has no relation to the admissibility of the evidence. The same credence in the witness, the same accurate perception of his evidence, is demanded from the tribunal to warrant belief in either. With regard to the matters which constitute the immediate subject of the evidence, each is equally direct. 1 Greenl. Ev. §§ 13, 13 (*a*), and notes; Com. *v.* Webster, 5 Cush. 295; U. S. *v.* Cole, 5 McLean, 513, 610; People *v.* Videto, 1 Parker, Crim. Rep. 603; McCann *v.* State, 21 Miss. 471; U. S. *v.* Gibert, 2 Sumner, 19; Read's case, 1 Central L. J. 219.

Circumstantial has been defined as "presumptive" evidence (§ 27, *supra*). Presumptive seems rather to be a species of evidence of which circumstantial is the genus. Wills, Circ. Ev. 18. (See § 296, n. 1, A. (*a*), *infra*). Circumstantial evidence has also been defined as "cumulative" evidence. Fowler, p. 130. This, however, states rather a frequent use than defines it. Vardeman *v.* Byrne, 7 How. (Miss.) 365. Mr. Justice Stephen has rejected the distinction. (Dig. Law Ev., art. 1, *in verb.* "Evidence.") So also Dr. Wharton (1 Whar. Ev. § 8 *et seq.*).

Direct and Circumstantial Evidence compared.— The relative merit of evidence, direct and circumstantial, is in controversy. On the one hand, it is claimed in behalf of circumstantial evidence that, while witnesses lie, facts do not. Blandy's case, 18 How. St. Tr. 1118, 1187; Paley, Moral and Political Philosophy, bk. 6, ch. 9; Ram on Facts (3d Am. Ed.), 287; Burnett, Crim. Law of Scotland, 523; 2 Burke's Works (H. & B.'s Ed.), 624. On the other hand, frequent reference is made to instances of wrong conviction. Ram on Facts (3d Am. Ed.), 439–459. The reply in each case has been (1) that, while facts do not lie, their narrators certainly may, and often do, and further, that our inferences from facts may be false; (2) that affirmative action must follow mental certitude based on the only evidence possible in the nature of the case, or the law must refuse to act. State *v.* Slingerland, 19 Nev. 135. So far as generalization is permitted by the nature of the subject, a distinction appears to be this. In quality of probative force, direct evidence necessarily has an inherent advantage, there being one less chance for error and the equation of human fallibility. In case of direct evidence, if the facts testified to be true, the ultimate proposition is established. In case of circumstantial evidence, the facts testified to may be entirely accurate, and the consequent inference, which establishes the proposition in issue, be utterly fallacious. This is an essential difference in kind; *cæteris paribus*, direct evidence is stronger. But with regard to quantity of probative force, in respect to the *degree* of certitude each species of evidence is capable of producing, circumstantial evidence has, in many instances, a cogency peculiar to itself, and fully equal to that of any direct evidence. Anderson's case, 83 Va. 326. Direct evidence is subject to fabrication and improper motive; when many witnesses concur, it is largely cumulative. On the other hand, the necessary correlation of facts, under the conditions of time, space, and causation, renders successful fabrication of circumstantial evidence an exceedingly difficult process. Donellan's case, charge of Buller, J.; Webster's case, per Shaw, C. J., Bemis's Rep. 462, 463; Burrill, Circ. Evid., 126 *et seq.* On its more positive side, it may be fairly said that facts, apparently remote and isolated, may, by unexpected relevancy, accurate adjustment, or numerous concurrence, give to circumstantial evidence a force far in excess of their own intrinsic value. That circumstantial evidence is equally trustworthy with direct, see West *v.* State, 76 Ala. 98; Territory *v.* Egan, 3 Dak. 119; Curran *v.* Percival, 21 Neb. 434; Lancaster *v.* State, 91 Tenn. 267.

CHAPTER II.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS AND FICTIONS OF LAW.[1]

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§ 296. The nature and admissibility both of direct and presumptive evidence having been considered in the preceding chapter, we proceed in the present to examine the latter more in detail, together with the kindred subjects of presumptions and fictions of law.

§ 297. The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish (*a*). "Infirmiora [argumenta] congreganda sunt. . . . Singula levia sunt, et communia: universa vero nocent, etiamsi non ut fulmine, tamen ut grandine" (*b*). Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone (*c*). Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing; any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another counterfeit note of the same manufacture, the presumption of guilty knowledge

(*a*) For a good instance, see *Richardson's case*, Append. No. 1.

(*b*) Quint. Inst. Orat. lib. 5, c. 12.

(*c*) 3 Benth. Jud. Ev. 242.

[1] For a full examination of the American law of presumptions, see p. 304.

becomes strong (*d*). And the same principle would apply in any other case where it had been proved that the prisoner had done the act charged, and the only remaining question was whether, at the time he did it, he had a guilty knowledge of the quality of his act (*e*).

§ 298. It is, however, of the utmost importance to bear in mind, first, that if all the circumstances proved arise from one source, they are not *independent* of each other; and that an increase in the number of the circumstances will not in such a case increase the probability of the hypothesis (*f*); secondly, that where a number of *independent* circumstances point to the same conclusion, the probability of the justness of that conclusion is, not the *sum* of the simple probabilities of those circumstances, but the compound result of them (*g*); and lastly, that the circumstances composing the chain must all be *consistent* with each other, — a principle obvious in itself, and which will be further illustrated hereafter (*h*).

§ 299. The term "presumption," in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted (*i*). It is, however, rarely employed in jurisprudence in this extended sense. Like "presumptive evidence" (*k*), it has there obtained a restricted legal signification, and is used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed,

(*d*) *R.* v. *Wylie*, or *Whiley*, 1 N. R. 92; 2 Leach, C. L. 983; *R.* v. *Ball*, R. & R. 132; 1 Campb. 324; *R.* v. *Green*, 3 Car. & K. 209. See also *R.* v. *Jarvis*, 1 Dearsl. C. C. 552, and *R.* v. *Foster*, *Id.* 456.

(*e*) *R. v. Francis*, L. Rep., 2 C. C. 128, 131; 43 L. J., M. C. 97, 100.

(*f*) Beccaria, Dei Delitti e delle Pene, § 7; 1 Stark. Ev. 567, 3rd Ed.; *Id.* 851, 4th Ed.

(*g*) 1 Stark. Ev. 568, 3rd Ed.; *Id.* 853, 4th Ed.; 2 Ev. Poth. 342.

(*h*) *Infrà*, sect. 3, sub-sect. 2.

(*i*) "Præsumptio nihil est aliud, quàm argumentum verisimile, communi sensu perceptum ex eo, quod plerumque fit, aut fieri intelligitur." Matthæus de Crimin. ad lib. 48 Dig. tit. 15, c. 6, n. 1. "On peut définer la présomption, un jugement que la loi ou l'homme porte sur la vérité d'une chose, par une conséquence tirée d'une autre chose. Ces conséquences sont fondées sur ce qui arrive communément et ordinairement." Pothier, Traité des Obligations, part. 4, ch. 3, sect. 2, § 839. See also Bonnier, Traité des Preuves, § 635. "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. . . . In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected." Per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 161, 162. "Where the existence of one fact so necessarily and absolutely induces the supposition of another that if the one is true, the other cannot be false, the term 'presumption' cannot be legitimately applied." 2 Ev. Poth. 329. See also Locke on the Human Understanding, bk. 4, ch. 14, § 4.

(*k*) See Introd. pt. 1, § 27, and *suprà*, § 293.

or admitted, or established by legal evidence to the satisfaction of the tribunal (*l*).

§ 300. But the English term "presumption," as well as the Latin "præsumptio," has been used by jurists and lawyers in several different senses. An attentive examination of the subject will detect at least seven: 1. The original or primary sense stated in the preceding article. 2. The strict legal sense there explained. 3. A generic term including every sort of *rebuttable* presumption; *i. e.*, rebuttable presumptions of law, strong presumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. It is only in this sense that the well-known maxim, "Stabitur præsumptioni donec probetur in contrarium," holds good. And here it will be necessary to advert to the language of L. C. B. Gilbert (*m*), who says that presumption is defined by the civilians, "Conjectura ex certo signo proveniens, quæ alio (non) adducto pro veritate habetur." This is far from correct. The above definition seems to be taken from a somewhat similar one given by Alciatus and Menochius, of presumptions of *law* (*n*); but it is wholly inapplicable either to præsumptiones juris et de jure, — whose very nature is to exclude all proof against what they assume as true, — or to those presumptions of fact which are too slight to shift the burden of proof. 4. A generic term applicable to certain as well as to contingent inferences (*o*). 5. On the other hand, the word "presumption" has even been restricted to the sense of *irrebuttable* presumption (*p*). 6. The popular sense of presumptuousness, arrogance, blind adventurous confidence, or unwarrantable assumption (*q*). 7. The Latin "præsumptio" had, at one time at least, another signification. In the Leges Hen. 1, c. 10, § 1, we find the expression "Præsumpcio terre vel pecunie regis;" where "præsumptio" is used in the sense of "invasio," "intrusio," or "usurpatio" (*r*). Some others will be found in Mascard. de Prob. quæst. 10; and Müller's note (*a*) to Struvius' Syntag. Jur. Civ. Exercit.

(*l*) See Domat, Lois Civiles, part. 1, liv. 3, tit. 6, Préamb. & sect. 4; 2 Ev. Poth. 332.

(*m*) Gilb. Evid. 156, 157, 4th Ed.

(*n*) Alciat. de Præs. pars 3, n. 1; Menoch. de Præs. lib. 1, quæst. 8, n. 1.

(*o*) Menoch. de Præs. lib. 1, quæst. 3; & quæst. 7, nn. 2 & 3; Titius, Jus Privat. lib. 2, c. 11, § 14, &c.; 3 Stark. Ev. 927, 3rd Ed.

(*p*) Grounds and Rudiments of Law, p. 186, 2nd Ed.; Branch, Max. p. 107, 5th Ed.; and Halkerston's Max. p. 79.

(*q*) Doct. & Stud. c. 26; Litt. R. 327; Hargr. Co. Litt. 155 b, n. (5); 4 & 5 Will. & M. c. 23, s. 10; 1 Geo. 1, c. 13, s. 17, stat. 2; 19 Geo. 3, c. 56, s. 3; 11 Geo. 4, and 1 Will. 4, c. 23, s. 5; 6 & 7 Will. 4, c. 76, s. 8; 8 & 9 Vict. c. 87, s. 10. The Latin "præsumptio" is frequently used in this sense by Bracton (see fol. 1 b, §§ 7 and 8; 6 a, § 5; 221 b, § 2): as also by the civilians and canonists; Mascard. de Prob. quæst. 10, nn. 1, 5, & 6; Alciat. de Præs. pars 2, n. 1, &c. See also the form of the commission of the peace, Dalt. Countr. Just. 16, 18; Archb. Justice of the Peace.

(*r*) See the Ancient Laws and Institutes of England, A.D. 1840, vol. 1, p. 519, n. (*b*), and Glossary.

28, § xv. The confusion necessarily consequent on so many meanings for the same word, joined to the great importance and natural difficulty of the subject of judicial presumptions, fully justify Alciatus (*s*) in speaking of it as "Materia valde utilis et quotidianâ in practicâ, sed confusa, inextricabilis ferè."

§ 301. Before proceeding farther, it seems advisable to advert to certain expressions, used by the civilians and canonists to indicate different kinds of proof, and the degrees of conviction resulting from them, which, although in a great degree obsolete, are not undeserving of notice. These are, "argumentum," "indicium," "signum," "conjectura," "suspicio," and "adminiculum." The term "argumentum" included every species of inference from indirect evidence, whether conclusive or presumptive (*t*). "Indicium" — "indice" in the French law — answers to that form of circumstantial evidence in ours where the inference is only presumptive, and was used to designate the fact giving rise to the inference, rather than the inference itself. Under this head were ranked the recent possession of stolen goods, vicinity to the scene of crime, sudden change of life or circumstances, &c. (*u*). By "signum" was meant indirect evidence coming under the cognisance of the senses; such as stains of blood on the person of a suspected murderer, indications of terror on being charged with an offence, &c. (*v*). "Conjectura" and "suspicio" were not so much modes of proof as expressions denoting the strength of the persuasion generated in the mind by evidence. The former is well defined, "Rationabile vestigium latentis veritatis, unde nascitur opinio sapientis" (*w*); or a slight degree of credence, caused by evidence too weak or too remote to produce belief, or even suspicion. It is only in the character of "indicative" evidence that this has any place in English law (*x*). "Suspicio" is a stronger term, — "Passio animi aliquid firmiter non eligentis" (*y*). *E.g.*, A. B. is found murdered; and C. D., a man of bad character, is known to have had an interest in his death: this might give rise to a *conjecture* that he was the murderer; and if in addition to this he had, a short time before the murder, been seen near the spot where the body was found, the feeling in favour of his guilt might amount to *suspicion*. "Adminiculum" meant any sort of evidence which is

(*s*) Alciat. de Præs. pars 1, n. 1.

(*t*) See Matthæus de Crimin. ad lib. 48 Dig. tit. 15, cap. 6, n. 1; and Vinnius, Jurisp. Contr. lib. 4, cap. 25 & 36.

(*u*) Mascard. de Prob. lib. 1, quæst. 15; Menochius de Præs. lib. 1, quæst. 7; Encyclopédie Méthodique, tit. Jurisprudence, Art. Indices; Bonnier, Traité des Preuves, §§ 14 & 636.

(*v*) Quintil. Inst. Orat. lib. 5, c. 9; Menoch. de Præs. lib. 1, quæst. 7, nn. 31–37.

(*w*) Mascard. de Prob. quæst. 14, n. 14.

(*x*) See bk. 1, pt. 1, § 93.

(*y*) Menoch. de Præs. lib. 1, quæst. 8, n. 41.

useless if standing alone, but useful to corroborate other evidence (*z*) These distinctions may appear subtilties to us, but for many reasons they were not without their use in the systems where they are found. The decision of all questions of law and fact was there intrusted to a single judge, one of the few limitations to whose power was, that the accused could not be put to the torture, in the absence of a certain amount of evidence against him (*a*).

§ 302. In dealing with this important subject, we propose to treat it in the following order: —

1. Presumptive evidence, presumptions generally, and fictions of law.
2. Presumptions of law and fact, and of mixed law and fact, usually met in practice.
3. Presumptions and presumptive evidence in criminal law.

SECTION I.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS GENERALLY, AND FICTIONS OF LAW.

§ 303. It is clear that presumptive evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring the existence of a fact from others, courts of justice (assuming the inference properly drawn) do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied for itself; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usages and habits of society (*b*). All such inferences are called by our lawyers "presumptions of *fact*," or "natural presumptions," and by the civilians, "præsumptiones hominis" (*c*); in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, and which are known by the name of "præsumptiones juris," or

(*z*) Menoch. de Præs. lib. 1, quæst. 7, nn. 57, 58, 59.

(*a*) Decret. Gratian. lib. 5, tit. 41, cap. 6; Matth. de Prob. cap. 2, n. 80.

(*b*) "The presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application." 1 Greenl. Ev. § 14, 7th Ed.

(*c*) Mascard. de Prob. Conclus. 1226, however, restricts the expression "naturæ præsumptio" to presumptions derived from the ordinary course of nature.

"presumptions of *law*" (*d*). To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "præsumptiones mixtæ," "*mixed* presumptions," or "presumptions of mixed law and fact." And — as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law (*e*) — we purpose, in accordance with the example of other writers on evidence, to deal with the latter first, together with the kindred subject of fictions of law. We shall then treat of the former, together with mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

Sub-Section I.

PRESUMPTIONS OF LAW, AND FICTIONS OF LAW.

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§ 304. Presumptions, or, as they are also called, "intendments" of law, and by the civilians, "præsumptiones seu positiones juris," are inferences or positions established by law, common or statute, and have been shown in the Introduction to this work (*f*), for reasons which it is unnecessary here to repeat, to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects: 1st, that in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal; while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. If, therefore, a judge directed a jury contrary to a presumption of law, a new trial

(*d*) See Introd. pt. 2, §§ 42 & 43.
(*e*) Ph. & Am. Ev. 457.
(*f*) Introd. pt. 2, §§ 42 & 43.

was, at common law, grantable *ex debito justitiæ* (*g*); and if a jury, or even a succession of juries, disregard such a presumption, a new trial will still be granted, *toties quoties*, as matter of right (*h*).[1] But when any other species of presumption is overlooked or disregarded, the granting of a new trial has always been held to be a matter for the discretion of the court, which will be more or less liberal in this respect, according to the nature and strength of the presumption. 2nd, (and here it is that the difference between the several kinds of presumptions is so strongly marked) as presumptions of law are, in reality, rules of law, and part of the law itself, the court may draw the inference whenever the requisite facts are before it (*i*); while other presumptions, however obvious, being inferences of fact, could not, at common law, be made without the intervention of a jury.

§ 305. The grounds of these præsumptiones juris are various. Some of them are natural presumptions which the law simply recognises and enforces. Thus the legal maxim that every one must be presumed to intend the natural consequence of his own act (*k*); and, therefore, that he who sets fire to a building intended injury to its owner; and that he who lays poison for, or discharges loaded arms at, another, intended death or bodily harm to that person, — merely establishes as law a principle to which the reason of man at once assents. But in most of the presumptions which we are now considering, the inference is only *partially* approved by reason, — the law, from motives of policy, attaching to the facts which give rise to it an artificial effect beyond their natural tendency to produce belief. Thus, although a receipt for money under hand and seal naturally gives rise to a presumption of payment, still it does not *necessarily* prove it; and the conclusive effect of such a receipt is a creature of the law (*l*). So the maxim by which a party who kills another is

(*g*) Ph. & Am. Ev. 464; *Haire* v. *Wilson*, 9 B. & C. 643. Under the Rules of the Supreme Court, Ord. XXXIX. Rule 6, a new trial would not be granted in such a case, unless, in the opinion of the court, the alleged misdirection had occasioned some substantial wrong or miscarriage in the trial of the action.

(*h*) Ph. & Am. Ev. 459; 1 Phill. Ev. 467, 10th Ed.; *Tindal* v. *Brown*, 1 T. R. 167–171.

(*i*) Steph. Plead. 391–392, 5th Ed.; 1 Chitty, Plead. 221, 6th Ed.

(*k*) 3 M. & Selw. 15; 9 B. & C. 645; *R.* v. *Sheppard*, R. & R. 169; *R.* v. *Farrington*, *Id.* 207.

(*l*) Gilb. Ev. 158, 4th Ed.

[1] As has been said *supra* (§ 296, n. 1, A. *b*), when conflicting evidence is gone into, a presumption of law has simply the evidentiary force of the presumption of fact upon which it is founded. When, therefore, other evidence beside the presumption of law is introduced, the question becomes one entirely of fact, and within the province of the jury, who will usually be permitted to give such force as they think fit to evidence of fact, without reversal of their verdict by the court. Crane *v.* Morris, 6 Pet. 598; Catlin *v.* Gilders, 3 Ala. 536; The Jane *v.* U. S., 7 Cranch, 363; U. S. *v.* Wiggins, 14 Pet. 334.

presumed to have done it maliciously seems to rest partly on natural equity and partly on policy. To these may be added a third class, in which the principle of legal expediency is carried so far as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offences, even mala prohibita, on the assumption that all persons in the kingdom, whether natives or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

§ 306. A very important distinction exists among presumptions of law, — namely, that some are absolute and conclusive, called by the common lawyers *irrebuttable presumptions*, and by the civilians *præsumptiones juris et de jure;* while others are conditional, inconclusive, or *rebuttable*, and are called by the civilians *præsumptiones juris tantùm*, or simply *præsumptiones juris*. The former kind has been most accurately defined by the civilians, "Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis." They add, "Præsumptio *juris* dicitur, quia lege introducta est; et *de jure*, quia super tali præsumptione lex inducit firmum jus, et habet eam pro veritate" (*m*). In a word, they are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Thus, where a cause has once been regularly adjudicated upon by a competent tribunal, from which there is no appeal, the whole matter assumes the form of res judicata; and evidence will not be admitted, in subsequent proceedings between the same parties, to show that decision to be erroneous (*n*). An infant under the age of seven years is not only presumed incapable of committing felony, but the presumption cannot be rebutted by the clearest evidence of a mischievous discretion (*o*). So a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary (*p*) unless the instrument is impeached for fraud (*q*). A receipt under hand and seal is conclusive evidence of the payment of money (*r*); and in the time of the old feudal tenures it was an irrebuttable presumption of law that a person under the age of twenty-one was incapable of performing knight service (*s*).

(*m*) Alciatus de Præs. pars 2, n. 3; Menoch. de Præs. lib. 1, quæst. 3, n. 17; Poth. Obl. § 807.

(*n*) See *infrà*, ch. 9.

(*o*) 1 Hale, P. C. 27–28; 4 Blackst. Comm. 23.

(*p*) Plowd. 308–309; 2 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.

(*q*) Stark. *in loc. cit.* See bk. 2, pt. 3, § 220.

(*r*) Gilb. Ev. 158, 4th Ed.

(*s*) Litt. sect. 103; Co. Litt. 78 b.

§ 307. These conclusive presumptions have varied considerably in the course of our legal history. Certain presumptions which in earlier times were deemed absolute and irrebuttable have, by the opinion of later judges, acting on more enlarged experience, either been ranged among præsumptiones juris tantùm, or considered as presumptions of fact to be made at the discretion of a jury (*t*). On the whole, modern courts of justice are slow to recognise presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To preclude a party, by an arbitrary rule, from adducing evidence which, if received, would compel a decision in his favour, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.

§ 308. Præsumptiones juris et de jure are not, however, without their use. On the contrary, when restrained within due limits, they exercise a very salutary effect in the administration of justice, by throwing obstacles in the way of vexatious litigation, and repressing inquiries where sound and unsuspected evidence is not likely to be obtained. Among the most useful in these respects may be ranked the principle which upholds the authority of res judicata, the intendments made by the courts to support the verdicts of juries, and, as expounded in modern times, the doctrine of estoppel.[1]

§ 309. "Fictions of law" are closely allied to irrebuttable presumptions of law.[2] "Fictio est legis, adversus veritatem, in re possibili, ex justâ causâ, dispositio" (*u*); in other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and præsumptiones juris et de jure consists in this, that the latter are arbitrary inferences which may or may not be true; while, in the case of fictions, the falsehood of the fact assumed is understood and avowed (*x*). "Super falso et certo fingitur, super incerto et vero præsumitur" (*y*). Thus, the præsumptio juris et de jure, that infants under the age of seven years are doli

(*t*) Ph. & Am. Ev. 460; 1 Phill. Ev. 469, 10th Ed.

(*u*) Gothofred. Not. 3, ad. lib. 22 Dig. tit. 3; Westenbergius, Principia Juris, ad lib. 22 Dig. tit. 3, § 28; Huberus, Positiones Juris, ad lib. 22 Dig. tit. 3, n. 25; Menoch. de Præs. lib. 1, quæst. 8; 3 Blackst. Comm. 43, n. (*b*). See also 2 Rol. 502, and Palm. 354.

(*x*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 21; Voet. ad Pand. lib. 22, tit. 3, n. 19; Alciatus de Præs. pars 1, n. 4.

(*y*) Gothofred. Not. (3) ad lib. 22 Dig. tit. 3.

[1] See § 532, n. 1, *infra*.

[2] For the American law on this subject, see p. 310.

incapaces for felonious purposes (*z*), is probably true in general, though false in particular instances; but when, in order to give jurisdiction to the courts at Westminster, the law used to feign that a contract which was really entered into at sea was made in some part of England (*a*), the assumption was avowedly false, and a fiction in the completest sense of the word.

§ 310. Fictions of law, as is justly observed by Mr. Justice Blackstone (*b*), though they may startle at first, will be found on consideration to be highly beneficial and useful. Like artificial presumptions, however, they have also their abuse; for we sometimes find them introduced into the jurisprudence of a country without adequate cause, or retained in it after their utility has ceased. They are invented, say the civilians, "ad conciliandam æquitatem cum ratione et subtilitate juris" (*c*); and it is a well-known maxim of the common law, "in fictione juris semper subsistit æquitas" (*d*);[1] in furtherance of which principle the two following rules have been laid down.

§ 311. First, fictions are only to be made for necessity, and to avoid mischief (*e*), and consequently they must never be allowed to work prejudice or injury to an innocent party (*f*): "Fictio juris non operatur damnum vel injuriam" (*g*). Thus, when a man seised in fee of lands marries, and makes a feoffment to another, who grants a rent-charge out of it to the feoffor and his wife, and to the heirs of the feoffor; the feoffor dies, and his wife recovers the moiety of the land for her dower by custom, — she may distrain but for half of the rent-charge; for although, by fiction of law, her claim of dower is above the rent, yet if that fiction were carried so far as to allow her to distrain for the whole rent, it would work a wrong to a third person, which the law will not allow (*h*). So, although the vouchee in a common recovery was, by fiction of law, considered tenant of the land, so far as to enable him to levy a fine to the demandant, or to accept a fine or release from him, still, as the vouchee had really nothing in the land, a fine by him to a stranger, or a fine or release to him from a stranger, was void (*i*).

(*z*) 1 Hale, P. C. 27–28; 4 Blackst. Comm. 23.

(*a*) 3 Blackst. Comm. 107; 4 Inst. 134.

(*b*) 3 Blackst. Comm. 43.

(*c*) Voet. ad. Pand. lib. 22, tit. 3, n. 19.

(*d*) 3 Blackst. Comm. 43; Co. Litt. 150 a; 10 Co. 40 a; 11 Co. 51 a.

(*e*) 3 Co. 30 a, *Butler's and Baker's case.*

(*f*) *Id.* 29; 11 Co. 51 a; 13 Co. 21 a.

(*g*) Palm. 354. See also 3 Co. 36 a; 2 Rol. 502; 9 Exch. 45.

(*h*) Co. Litt. 150 a.

(*i*) Co. Litt. 265 b; 3 Co. 29 b.

[1] For an American case, see Low *v.* Little, 17 Johns. 346, acc.

§ 312. Secondly, it is said to be a rule that the matter assumed as true must be something physically possible (*k*). "Lex non intendit aliquid impossibile" (*l*). "Lex non cogit ad impossibilia" (*m*). "Nulla impossibilia sunt præsumenda" (*n*). Thus, says Huberus, where a man devises his property, on condition that the devisee shall do a certain act within a limited time after the death of the devisor, until that time has expired with the condition unperformed, the deceased cannot be said to have died intestate; because the condition, when performed, has a retrospective effect to the time of the death. But if the limited time be allowed to elapse with the condition unperformed, no subsequent performance of it can have relation back to the day of the death; for this would involve the absurdity of a man who had already died intestate being deemed to have died testate at a time subsequent to his decease (*o*).

§ 313. Fictions of law are of three kinds: affirmative or positive fictions, negative fictions, and fictions of relation (*p*). In the case of affirmative fictions, something is assumed to exist which in reality does not; such as the fiction of lease, entry, and ouster, in actions of ejectment, previous to the 15 & 16 Vict. c. 76; the old fiction, that the plaintiff in all suits on the law side of the Exchequer was accountant to the crown (*q*); and the ac etiam clause in writs, by means of which the Court of Queen's Bench preserved its jurisdiction over matters of debt, after the passing of 13 Car. 2, c. 2, st. 2 (*r*), &c. In negative fictions, on the contrary, that which really exists is treated as if it did not. Thus, a disseisee, after his re-entry,

(*k*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 22; Alciatus, de Præs. pars 1, n. 5; Devot. Inst. Canon. lib. 3, tit. 9, § 28, not. 2, 5th Ed. "Chescun fiction doit estre *ex re possibili;* ceo ne serra d'impossible, car le ley imitate nature;" per Doddridge, J., in *Sheffield* v. *Ratcliffe*, 2 Rol 501. The existence of this rule has been denied, and especially by Titius (Jus Privatum, &c., lib. 1, cap. 9, §§ 1 & 13), who says of fictions in general, "totus iste fictionum apparatus, non tantum non necessarius, sed inutilis ineptusque;" and he adduces, as instances of feigned impossibilities, the 26th Constitution of the Emperor Leo, entitled, "ut eunuchi adoptare possint;" and also the fact that a child in ventre sa mère is susceptible of many rights just as if it had been actually born. In the latter of these cases, however, the fiction involves no impossibility, its only operation being with relation to time; and with respect to the former, it is clear from the preamble of the constitution in question, that the right to adopt given to the persons in the condition there mentioned, was conferred on them as an indulgence, without any reference to a supposed power of procreation.

(*l*) 12 Co. 89.

(*m*) Co. Litt. 92 a, 231 b; 9 Co. 73 a; Hob. 96.

(*n*) Co. Litt. 78 b.

(*o*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 22.

(*p*) "Tres constitui solent species. 1. *Affirmativa, Positiva,* seu *Inductiva,* qua aliquid ponitur seu inducitur, quod non est. 2. *Negativa* seu *Privativa,* qua id, quod revera est, fingitur, ac si non esset. 3. *Translativa,* qua id, quod est in uno, transfertur in aliud." Westenbergius, Principia Juris, lib. 22, tit. 3, § 29.

(*q*) 3 Blackst. Comm. 46.

(*r*) *Id.* 287, 288.

may maintain trespass for injury done to the freehold during his disseisin, on the principle that, so far as the disseisor and his servants are concerned, the freehold must be taken never to have been divested out of the disseisee (*s*). Fictions of relation are of four kinds (*t*): First, where the act of one person is taken to be the act of another; as where the act or possession of a servant is deemed the act or possession of his master. So, where a felonious act is done by one person in the presence of others who are aiding or abetting him, the act of that one is, in contemplation of law, the act of all (*u*). "Qui per alium facit, per seipsum facere videtur" (*x*). Second, where an act done by or to one thing is taken, by relation, as done by or to another; as where the possession of land is transferred by livery of seisin, or a mortgage of land is created by delivery of the title-deeds. Third, fictions as to place; as in the case already put, of a contract made at sea, or abroad, being treated as if made in England, and the like (*y*). There is a curious instance of this kind of fiction in the civil law, by which Roman citizens who were made prisoners by an enemy were on their return home supposed never to have been prisoners at all, and were entitled to civil rights as if they had not been out of their own country (*z*). Fourth (and lastly), fictions as to time. Thus, where a feoffment was made with livery of seisin, a subsequent attornment by the tenant was held to relate back to the time of the livery (*a*). It is on this principle that the title of an executor or administrator to the goods of the testator or intestate relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration (*b*), — an extremely useful fiction, to prevent the property of the deceased being made away with. And it is a fixed principle, that ratification has relation back to the time of the act done, — "Omnis ratihabitio retrotrahitur et mandato æquiparatur" (*c*), a maxim which has been well explained in some modern cases (*d*), and was also known in the Roman law (*e*). By a similar rule, an Act of Parliament becomes law as soon as the day

(*s*) 11 Co. 51 a, *Liford's case*. See also *Barnett* v. *The Earl of Guildford*, 11 Exch. 19.

(*t*) "Translatio fit. 1. *A personâ in personam*. 2. *De re ad rem*. 3. *De loco ad locum*. 4. *De tempore ad tempus*." Westenbergius, Principia Juris, lib. 22, tit. 3, § 30.

(*u*) 1 Hale, P. C. 437.

(*x*) Co. Litt. 258 a. See Dig. lib. 43, tit. 16, l. 1, § 12.

(*y*) 3 Blackst. Comm. 107.

(*z*) Dig. lib. 49, tit. 15, l. 12, § 6.

(*a*) 3 Co. 29 a.

(*b*) See the cases collected in *Tharpe* v. *Stallwood*, 5 Man. & Gr. 760.

(*c*) Co. Litt. 180 b, 207 a, 245 a, 258 a; 9 Co. 106 a; 4 Inst. 317; 1 Wms. Saund. 264 b, n. (*e*), 6th Ed.; 3 B. Moore, 619, 6 Scott, N. R. 896; 2 Exch. 185 and 188; 4 *Id.* 790, 798; 7 H. & N. 693.

(*d*) *Wilson* v. *Tumman*, 6 Scott, N. R. 894, 6 Man. & Gr. 236; *Bird* v. *Brown*, 4 Exch. 786; *Buron* v. *Denman*, 2 Exch. 167.

(*e*) Dig. lib. 46, tit. 3, l. 12, § 4; lib. 43, tit. 16, l. 1, § 14; lib. 3, tit. 5, l. 6, § 9, Cod. lib. 4, tit. 28, l. 7.

of its passing commences, so that whatever happens on that day happens (in law) after the passing of the Act (*f*), and judicial acts in the course of a suit are referred back to the commencement of the day, though the rule does not apply to the acts of a party (*g*).

§ 314. The other kind of presumptions of law, which we have called rebuttable presumptions, or præsumptiones juris tantùm, has been thus correctly defined by one of the civilians: "Præsumptio juris dicitur, quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut præsumptione contrariâ fortiore enervata fuerit" (*h*). Every word of this sentence is worthy of attention. First, like the former class, these presumptions are intendments made by law; but, unlike them, they only hold good until disproved. Thus, although the law presumes all bills of exchange and promissory notes to have been given and indorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence (*i*). So the legitimacy of a child born during wedlock may be rebutted by proof of the absence of the opportunity for sexual intercourse between its supposed parents (*j*).[1] So, while the law presumes every infant between the ages of seven and fourteen to be incapable of committing felony, as being doli incapax, still a mischievous discretion may be shown; for, malitia supplet ætatem (*k*). And there are many instances of children under the age of fourteen being punished capitally. To this class also belong the well-known presumptions in favour of innocence, and sanity, and against fraud; the presumption that legal acts have been performed with the solemnities required by law; that every person discharges the duties or obligations which the law casts upon him (*l*), &c. The concluding words of the definition of this species of presumptions show that they may be rebutted by presumptive as well as by direct evidence, and that the weaker presumption will give place to the stronger (*m*).

(*f*) *Tomlinson, app., Bullock, resp.*, 4 Q. B. D. 230.

(*g*) See *Edwards* v. *Regina*, 9 Ex. 628; and *Clarke* v. *Bradlaugh* (C. A.) 8 Q. B. D. 63, in which latter case the defendant unsuccessfully contended that the court could not inquire at what period of the day a writ of summons was issued against him.

(*h*) Voet. ad Pand. lib. 22, tit. 3, n. 15. Another civilian, more ancient, defines a presumption of law, "Animi legislatoris ad verisimile applicatio, onus probandi transferens." Baldus, in Rubr. Cod. de Probat. n. 8.

(*i*) 3 Stark. Ev. 930, 3rd Ed.; *Id.* 747, 4th Ed.; Byles on Bills, ch. 10, 8th Ed.

(*j*) See on this subject, *infrà*, sect. 2, sub-sect. 3.

(*k*) 1 Hale, P. C. 26; 4 Blackst. Comm. 23; 12 Ass. Pl. 30.

(*l*) *Infrà*, sect. 2, sub-sects. 3 and 4.

(*m*) *Infrà*, sub sect. 3.

[1] The American law is to the same effect, see Herring *v.* Goodson, 43 Miss. 392; Sullivan *v.* Kelly, 3 All. 148; Com. *v.* Connelly, 1 Browne (Pa.), 284; Com. *v.* Shepherd, 6 Binney, 283; State *v.* Pettaway, 3 Hawks, 623, acc.

Sub-Section II.

PRESUMPTIONS OF FACT, AND MIXED PRESUMPTIONS.

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§ 315. We now return to a more particular examination of præsumptiones hominis, or presumptions of fact; in treating of which it is proposed to consider, — 1st. The grounds or sources whence they are derived; 2nd. Their probative force. We shall then briefly explain the nature of præsumptiones mixtæ, or presumptions of mixed law and fact; and lastly, show the extent to which the discretion of juries in drawing presumptive inferences is controlled or reviewed by courts of law.

§ 316. 1.° The grounds or sources of presumptions of fact are obviously innumerable, — they are co-extensive with the facts, both physical and psychological, which may under any circumstances whatever become evidentiary in courts of justice (*n*); but, in a general view, such presumptions may be said to relate to *things*, *persons*, and the *acts and thoughts* of intelligent agents (*o*). With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be

(*n*) "Desumitur [præsumptio] ex personis, ex causis, ex loco, ex tempore, ex qualitate, ex silentio, ex familiaritate, ex fugâ, ex negligentiâ, ex vicinià, ex obscuritate, ex eventu, ex dignitate, ex ætate, ex quantitate, ex amore, ex societate, &c." Matth. de Prob. cap. 2, n. 1.

(*o*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17.

presumed. Thus, the order and changes of the seasons, the rising, setting, and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things. The same rule extends to persons. Thus, the absence of those natural qualities, powers, and faculties which are incident to the human race in general will never be presumed in any individual; such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, &c. (*p*). To this head are reducible the presumptions which juries are sometimes called on to make, relative to the duration of human life, the time of gestation, &c. Under the third class — namely, the acts and thoughts of intelligent agents — come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as, for instance, by paying money not due (*q*); and so it is a maxim that every one must be taken to love his own offspring more than that of another person (*r*). Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another will first call in the debt of longest standing (*s*).

§ 317. 2.° The vast field over which presumptive reasoning extends must render ineffectual any attempt to reduce into definite classes, according to their degree of probative force, the presumptions to which it gives rise. Some classification, however, has generally been deemed convenient (*t*); and there is one which, on the strength of certain high authorities, seems to have become embodied into our law of evidence. "Many times," says Sir Edward Coke (*u*), "juries, together with other matter, are much induced by presumptions; whereof there be three sorts, — viz., violent, probable, and light or temerary. *Violenta præsumptio* is many times plena probatio; *præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all." "Præsumptio violenta valet in lege" (*x*). As an instance of violenta præsumptio, amounting to plena probatio, Sir Edward Coke (*y*) — and in this he is followed by several other

(*p*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17.

(*q*) Voet. ad Pand. lib. 22, tit. 3, n. 15; Dig. lib. 22, tit. 3, l. 25.

(*r*) Co. Litt. 373 a. See also 2 Inst. 564.

(*s*) Gilb. Ev. 157–158, 4th Ed.; 1 Ev. Poth. § 812; Cod. lib. 10, tit. 22, l. 3.

(*t*) A large number, taken from the works of the earlier civilians, are collected by Menoch. de Præs. lib. 1, quæst. 2.

(*u*) Co. Litt. 6 b.

(*x*) Jenk. Cent. 2, Cas. 3.

(*y*) Co. Litt. 6 b.

eminent authors (*z*) — puts the case of a man who, being in a house, is run through the body with a sword, and instantly dies of that wound; whereupon another man is seen to come out of that house, with a bloody sword, no other man being at that time in the house. "This," observes Chief Baron Gilbert (*a*), "is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself is the proof of those circumstances that do necessarily attend such fact." Notwithstanding the weight of authority in its favour, this illustration of violent presumption has been made the subject of much and deserved observation. If the authors just quoted mean to say, as their words imply, that there is no possible mode of reconciling the above facts with the innocence of the man who is seen coming out of the house, the proposition is monstrous! Any of the following hypotheses will reconcile them, and probably others might be suggested. First, that the deceased, with the intention of committing suicide, plunged the sword into his own body; and that the accused, not being in time to prevent him, drew out the sword, and so ran out, through confusion of mind, for surgical assistance (*b*). Second, that the deceased and the accused both wore swords; that the deceased, in a fit of passion, attacked the accused; and that the accused, being close to the wall, had no retreat, and had just time enough to draw his sword, in the hope of keeping off the deceased, who, not seeing the sword in time, ran upon it and so was killed (*c*). Third, that the deceased may in fact have been murdered, and that the real murderer may have escaped, leaving a sword sticking in or lying near the body, and the accused, coming in, may have seized the sword and run out to give the alarm (*d*). Fourth, that the sword may have been originally used in an attack by the accused on the deceased, and wrenched from, and afterwards turned against the deceased by the accused, under danger of attack on his life by pistol or otherwise (*e*). Perhaps, however, Sir Edward Coke and Chief Baron Gilbert only meant that the above facts would constitute a sufficient primâ facie case to call on the accused for his defence, and in the absence of explanation by him would warrant the jury in declaring him guilty (*f*).

(*z*) 2 Hawk. P. C. c. 46, s. 42; 1 Stark. Ev. 562, 3rd Ed.; *Id.* 843, 4th Ed.; Gilb. Ev. 157, 4th Ed., &c. See also n. (*f*), p. 303.

(*a*) Gilb. Evid. *in loc. cit.*

(*b*) 3 Benth. Jud. Ev. 236; Burnett's Crim. Law, Scotl. 508.

(*c*) 3 Benth. Jud. Ev. 236, 237.

(*d*) Goodeve, Evid. 32.

(*e*) *Id.*

(*f*) Their language seems to have been so understood by Mounteney, B., in the case of *Annesley* v. *The Earl of Anglesea* (17 How. St. Tr. 1430). Mr. Starkie, however, says, that the circumstances wholly and necessarily exclude any but *one* hypothesis. (1 Stark. Ev. 562, 3rd Ed.; *Id.* 844, 4th Ed.) The illustration

§ 318. The utility of the classification of presumptions of fact into violent, probable, and light is questionable (*g*); but if it be thought desirable to retain it, the following good illustration is added from a well-known work on criminal law: "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight" (*h*).

§ 319. A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or onus probandi; the general principles and rules of which have been explained in the First Part of the present Book (*i*). Præsumptiones hominis, or presumptions of fact, are divided into *slight* and *strong*, according as they are or are not of sufficient weight to shift the burden of proof (*j*). *Slight* presumptions, although sufficient to excite suspicion, or to produce an impression in favour of the truth of the facts they indicate, do not, when *taken singly*, either constitute proof or shift the burden of proof. Thus, the fact of stolen property being found in the possession of the supposed criminal a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defence (*k*). So, where money has

given by Sir Edward Coke, of a violent presumption, is very ancient, and seems to have been a favourite both among the early civilians and the common-law lawyers. The facts stated in the text are expressly adduced by Bartolus, in the 14th century, and other writers of that and subsequent periods, as conclusive proof of murder (Bartolus, Comment. in 2ndam partem Dig. Novi, de Furtis, 121 a, Ed. Lugd. 1547); and they were deemed, in our own law, sufficient to support a counterplea to a wager of battle, and thus oust the appellee of his right to invoke the judgment of Heaven. Staundf. P. C. lib. 3, c. 15, Counterplees al Battaile; Bracton, lib. 3, fol. 137. See also Britton, fol. 14. Their inconclusiveness, however, did not escape the notice of some of the more enlightened civilians, both before and since the time of Coke. See Boerius, Quæstiones, 168; Voet. ad Pand. lib. 22, tit. 3, n. 14, &c.

(*g*) 2 Gr. Russ. 727. It is retained in Devot. Institut. Canon. lib. 3, tit. 9, § 30, Paris, 1852.

(*h*) Archb. Crim. Plead. 259, 19th Ed.

(*i*) *Suprà*, pt. 1. ch. 2.

(*j*) "Præsumptio [hominis] rectè dividitur in leviorem, et fortiorem. Levior movet suspicionem, et judicem quodammodo inclinat; sed per se nullum habet juris effectum, nec onere probandi levat." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 15. See also Matth. de Prob. c. 2, nn. 1 & 5; Westenbergius, Principia Juris, lib. 22, tit. 3, §§ 26, 27.

(*k*) *Suprà*, bk. 2, pt. 2.

been stolen, and money, similar in amount and in the nature of the pieces, is found in the possession of another person, but none of the pieces are identified, and there is no other evidence against him (*l*). And in the civil law, where a guardian who originally had no estate of his own became opulent during the continuance of his guardianship, this fact, standing alone, was deemed insufficient to raise even a primâ facie case of dishonesty against him (*m*); the Code justly observing, "nec enim pauperibus industria, vel augmentum patrimonii quod laboribus, et multis casibus quæritur, interdicendum est" (*n*). To this class also belong the presumption of guilt, derived from footmarks resembling those of a particular person being found on the snow or ground near the scene of crime (*o*); the presumption of homicide from previous quarrels (*p*), or from the accused having a pecuniary interest in the death of the deceased (*q*).

§ 320. But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete a body of proof which would otherwise be imperfect, but the concurrence of a large number of them may (each contributing its individual share of probability) not only shift the onus probandi, but amount to proof of the most convincing kind (*r*). "A man's having observed the ebb and flow of the tide to-day," observes Bishop Butler (*s*), "affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow; but the observation of this event for so many days and months and ages together, as it has been observed by mankind, gives us a full assurance that it will." Convictions, even for capital offences, constantly take place on this kind of evidence (*t*); and the following good illustration, in a civil case, is given by Pothier from the text of the Roman law (*u*): "A sister was charged with the payment of a sum of money to her brother; after the death of the brother, there was a question whether this was still due to his successor. Papinian decided (*v*), that it ought to be presumed that the brother had released it to his sister; and he founded the presumption

(*l*) 1 Stark. Ev. 569, 3rd Ed.; *Id.* 854, 4th Ed.

(*m*) Voet. ad Pand. lib. 22, tit. 3, n. 14; 2 Ev. Poth. 345.

(*n*) Cod. lib. 5, tit. 51, l. 10.

(*o*) Mascard. de Prob. quæst. 8, nn. 21–23; *R.* v. *Britton*, 1 Fost. & F. 354.

(*p*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, Préamb.

(*q*) 3 Benth. Jud. Ev. 188.

(*r*) 1 Ev. Poth. art. 815, 816; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, nn. 4 and 16; *Id.* Positiones Jur. sec. Pand. lib. 22, tit. 3, n. 19; Matth. de Crim. ad lib. 48 Dig. tit. 15, c. 6; Voet. ad Pand. lib. 22, tit. 3, n. 18; 1 Stark. Ev. 570, 3rd Ed.; *Id.* 855, 4th Ed.

(*s*) Butler's Analogy of Religion, Introduction.

(*t*) See *infrà*, sect. 3, and App.

(*u*) 1 Ev. Poth. art. 816.

(*v*) "Denied," in Evans's translation of Pothier, is an obvious misprint.

of such release on three circumstances: 1st, From the harmony which subsisted between the brother and the sister; 2nd, From the brother having lived a long time without demanding it; 3rd, From a great number of accounts being produced, which had passed between the brother and sister, upon their respective affairs, in none of which was there any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to Papinian to be sufficient proof of such release" (*w*).

§ 321. *Strong* presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to rebut them involved the proof of a negative (*x*). The evidentiary fact giving rise to such a presumption is said to be "*primâ facie* evidence" of the principal fact of which it is evidentiary. Thus possession is primâ facie evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them (*y*). So, a receipt for rent accrued due subsequently to that sued for is primâ facie evidence that all rent had been paid up to the time of giving the receipt, — as it is unlikely that a landlord would not first call in the debt of longest standing (*z*).

§ 322. Presumptions of this nature are entitled to great weight, and when there is no other evidence, are generally decisive in civil cases (*a*). In criminal, and more especially in capital cases, a greater degree of caution is of course requisite, and the technical rules regulating the burden of proof are not always strictly adhered to (*b*).

§ 323. The resemblance between inconclusive presumptions of law and strong presumptions of fact cannot have escaped notice, the

(*w*) This is the law "Procula," which will be found Dig. lib. 22, tit. 3, l. 26. Sir W. D. Evans, in his valuable edition of Pothier, observes on this passage that it does not sufficiently appear from the law, as given in the Digest, that the brother had lived any great length of time, or that harmony had existed between him and his sister. He seems, however, to have overlooked the phrase "quamdiu vixit," and the peculiar expression "desideratum."

(*x*) See *Byrne* v. *Boadle*, 2 H. & C. 722; *Kearney* v. *London and Brighton Railway Company*, L. Rep., 5 Q. B. 411; *S. C.* (in Cam. Scac.), 6 *Id.* 759. "Præsumptio fortior vocatur, quæ determinat judicem, ut credat, rem certo modo se habere, non tamen quin sentiat, eam rem aliter se habere posse. Ideoque ejus hic est effectus, quod transferat onus probandi in adversarium, quo non probante, pro veritate habetur." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16. See also, Heinec. ad Pand. pars 4, § 124; Matth. de Prob. cap. 2, n. 5; Westenbergius, Principia Juris, lib. 22, tit. 3, § 27.

(*y*) See bk. 2, pt. 2.

(*z*) Gilb. Ev. 157, 4th Ed.

(*a*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16.

(*b*) *Id.* See *R.* v. *Hadfield*, 27 How. St. Tr. 1282, 1353.

effect of each being to assume something as true until it is rebutted; and, indeed, in the Roman law, and in other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible (*c*). But it must never be lost sight of in the common law, where the functions of judge and jury are usually kept distinct. Unfortunately, however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption which juries should be advised to make, and sometimes as one which it was obligatory on them to make (*d*).

§ 324. We now come to the consideration of "mixed presumptions;" or, as they are sometimes called, "presumptions of mixed law and fact," and "presumptions of fact recognised by law." These hold an intermediate place between the two former, and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law; and, from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognised by statute. They are, in truth, a sort of quasi præsumptiones juris; and, like strict legal presumptions, may be divided into three classes: 1st, Where the inference is one which common-sense would have made for itself; 2nd, Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and 3rd, Where from motives of legal policy, juries are recommended to draw inferences which are purely artificial. The two latter classes are chiefly found, where long-established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume, without proof, the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances (*e*).

§ 325. Artificial presumptions of this kind require to be made with caution; and it must be acknowledged that the legitimate limits of

(*c*) "Quælibet exempla fortiorum, quas diximus Præsumptionum, quatenus legibus prodita sunt, ad hanc classem" (scil. præs. jur.) "non malè referuntur, si hac distinctione placeat uti." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 18. See also Gresley, Evid. in Eq. 483–484, 2nd Ed.

(*d*) Ph. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th Ed.

(*e*) *Infrà*, sect. 2, sub-sect. 5.

the practice have often been very much overstepped (*f*). There are in the books many cases on this subject, which cannot now be considered as law, and some of which even border on the ridiculous. Thus, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant, the court refused a new trial (*g*). In another case, Lord Ellenborough is reported to have cited with approbation an expression of Lord Kenyon, that, in favour of modern enjoyment where no documentary evidence existed, he would presume two hundred conveyances, if necessary (*h*).[1] So, in *Wilkinson* v. *Payne* (*i*), which was an action on a promissory note, given to the plaintiff by the defendant in consideration of his marrying the defendant's daughter, to which the defence set up was that the marriage was not a legal one, as the parties were married by licence when the plaintiff was under age, and there was no consent of his parents or guardians, — it appeared in evidence that both his parents were dead when the marriage was celebrated, and there was no legal guardian; but that the plaintiff's mother, who survived the father, had, when on her death-bed, desired a friend to become guardian to her son, with whose approbation the marriage took place. It also appeared that, when the plaintiff came of age, his wife was lying on her death-bed, in extremis, and that she died in three weeks afterwards; but that in her lifetime she and the plaintiff were always treated by the defendant and his family as man and wife. Upon these facts, Grose, J., left it to the jury to presume a *subsequent* legal marriage, which they did accordingly, and found a verdict for the plaintiff, and the court refused a new trial (*k*). This case has been severely commented on by Sir W. D. Evans (*l*); and indeed it is

(*f*) See *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232, 236–237, per Abbott, C. J.; *Harmood* v. *Oglander*, 8 Ves. 106, 130, n. (*a*), per Lord Eldon, C.; *Day* v. *Williams*, 2 C. & J. 460, 461, per Bayley, B.; *Doe* d. *Shewen* v. *Wroot*, 5 East, 132; *Gibson* v. *Clark*, 1 Jac. & W. 159, 161, n. (*a*).

(*g*) Cited by Lord Kenyon in *Wilkinson* v. *Payne*, 4 T. R. 468, 469.

(*h*) *Countess of Dartmouth* v. *Roberts*, 16 East, 334, 339.

(*i*) 4 T. R. 468.

(*k*) These are not the only instances which might be cited. See the case of *Powell* v. *Milbanke*, Cowp. 103 (n.), where Lord Mansfield advised a jury to presume a grant from the crown, on the strength of enjoyment under two presentations stolen from the crown. That case was condemned by Lord Eldon, C., in *Harmood* v. *Oglander*, 8 Ves. 106, 130, n. (*a*), and was spoken of by Eyre, C. B., in *Gibson* v. *Clark*, 1 Jac. & W. 159, 161, n. (*a*), as "presumption run mad." See also n. (*m*), *infrà*.

(*l*) 2 Ev. Poth. 330. See also Gresley, Evid. in Eq. 485–486, 2nd Ed.; and per Parke, B., in *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 511.

[1] For American authorities, see Brattle Sq. Ch. *v.* Bullard, 2 Metc. 363; McNair *v.* Hunt, 5 Mo. 300; Hepburn *v.* Auld, 5 Cranch, 262; Maverick *v* Austin, 1 Bailey (S. C.), 59, acc.

impossible not to assent to the observation that rulings of this kind afford a temptation to juries to trifle with their oath, by requiring them to find as true facts which are probably, if not obviously, false (*m*). Of late years more correct views have grown up; and in several modern cases judges have refused to direct certain artificial presumptions to be made (*n*). When thus restrained within their legitimate limits, presumptions of this kind are not without their use. To suppose an absurdity, in order to meet the exigency of a particular case, must ever be fraught with mischief; but it is evidently different when, in conformity to a settled rule of practice, juries are directed to presume the existence of ancient documents, or the destruction of formal ones; or to make other presumptions, on subjects necessarily removed from ordinary comprehension, but which the rules of law require to be submitted to and determined by them. Both judges and juries are frequently compelled, in obedience to the Statutes of Limitations and the strict presumptions of *law*, to assume as true facts which in reality are not so; and the ends of justice may render a similar course necessary, in the case of those mixed presumptions which, although not technically, are virtually made by law. Some of the most important of these presumptions have in modern times been erected by the legislature into rules of law (*o*).

§ 326. The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries by the court depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, such as the existence of moduses, and other immemorial rights, from uninterrupted modern user, the jury should be told that they *ought* to make the presumption, unless evidence is given to the contrary; it should not be left to them as a matter for their discretion (*p*). And the same rule seems to apply where the presumption is one of much natural weight and of frequent occurrence, as where larceny is inferred from the recent possession of stolen property (*q*). In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the best general rule is, that the jury should be *advised* or *recommended* to

(*m*) 3 Stark. Ev. 934, 3rd Ed.; *Id.* 754, 4th Ed.; and see *Angus* v. *Dalton*, 3 Q. B. D., at p. 105, per Cockburn, C. J.; and *Dalton* v. *Angus*, 6 App. Cas., at p. 812, per Lord Blackburn.

(*n*) *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232; *Doe* d. *Hammond* v. *Cooke*, 6 Bing. 174; *Wright* v. *Smithies*, 10 East, 409; *R.* v. *The Chapter of Exeter*, 12 A. & E. 512.

(*o*) See 3 & 4 Will. 4, c. 42, s. 3; *infrà*, sect. 2, sub-sect. 7; 2 & 3 Will. 4, cc. 71 and 100; *infrà*, sect. 2, sub-sect. 5.

(*p*) *Shephard* v. *Payne* (in Cam. Scac.), 16 C. B. N. S. 132, 135; *Lawrence* v. *Hitch* (in Cam. Scac.), L. Rep., 3 Q. B. 521; *Jenkins* v. *Harvey*, 1 C. M. & R. 877; *Pilots of Newcastle* v. *Bradley*, 2 E. & B. 431. See, however, per Lord Denman in *Brune* v. *Thompson*, 4 Q. B. 543, 552.

(*q*) See *suprà*, § 323, n. (*e*).

make the presumption (*r*). To lay down rules for all cases would of course be impossible; but the language of the courts, expressed in decided cases in regard to particular presumptions, may in general be expected to exercise considerable influence, in the determination of future cases in which the like presumptions may arise (*s*).

§ 327. It has been already stated (*t*), as a characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury, a new trial is granted as matter of right, but that the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court (*u*). Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over everything that relates to the administration of justice (*v*), will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury.[1] But new trials will not always be granted when *successive* juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule it may be stated that not more than one or two new trials would be granted (*w*). There are, however, some mixed presumptions which the policy of the law, convenience, and justice so strongly require to be made, that the courts will go farther in order to uphold them. The principal among these are the existence of prescriptive rights and grants, from long-continued possession (*x*), &c. But it may well be doubted whether, even in such cases, the rule is as has been suggested (*y*); viz., that if the jury disregard the recommendation of the judge, — that such evidence warrants the presumption, — the court will direct a new trial *toties quoties*. This would be very like setting aside trial by jury; and where several sets of men find on their oaths in a particular way, it would be more reasonable to presume that they did not do so without good grounds.[2]

(*r*) See *R.* v. *Joliffe*, 2 B. & C. 54.

(*s*) Ph. & Am. Ev. 461; 1 Phill. Ev. 470, 10th Ed.

(*t*) *Supra*, § 304.

(*u*) See *Tindal* v. *Brown*, 1 T. R. 167.

(*v*) *Goodwin* v. *Gibbons*, 4 Burr. 2108; *Burton* v. *Thompson*, 2 Burr. 664.

(*w*) See *Foster* v. *Steele*, 3 Bing. N. C. 892; *Swinnerton* v. *The Marquis of Stafford*, 3 Taunt. 232; *Foster* v. *Allenby*, 5 Dowl. 619; *Davies* v. *Roper*, 2 Jur. N. S. 167.

(*x*) *Jenkins* v. *Harvey*, 1 C. M. & R. 877, 895, per Alderson, B.; *Gibson* v. *Muskett*, 3 Scott, N. R. 419.

(*y*) Gale on Easements, 5th Ed. 162, citing *Jenkins* v. *Harvey*, 1 C. M. & R. 895.

[1] For an American case to same effect, see Turnley *v.* Black, 44 Ala. 159; Goggans *v.* Monroe, 31 Ga. 331.

[2] For American law, see Hilliard, New Trials, ch. 2, § 2; State *v* Farish, 23 Miss. 483, acc.

Especially would this be so in view of the strong discouragement of new trials by recent decisions (*y'*).

(*y'*) See, *e. g.*, *Phillips* v. *Martin*, 15 App. Cas. 193; *Metropolitan R. Co.* v. *Wright*, 11 App. Cas. 152.

AMERICAN NOTES.

(§ 296) Presumptions. — A. Presumptions of Fact and Presumptions of Law. B. Various Meanings of the Term "Presumption."

A. Presumptions of Fact and Presumptions of Law. — Presumptions, in general, are said to be (*a*) presumptions of fact, and (*b*) presumptions of law. Conf. 8 Am. L. R. 378, 379.

(*a*) *Presumption of Fact.* — The meaning of the phrase "presumption of fact" suggests the distinction (noted § 293, n. 1, *supra*) between "direct" and "circumstantial" evidence. When it is sought to establish a fact in issue by actual, percipient witnesses, a single mental process is necessary to certitude — to wit, belief in the witnesses — in their accuracy, veracity, powers and opportunities of observation. This is direct evidence. When the attempt is made to establish such fact, not by proof of itself directly, but by proof of other facts which render its existence in any degree probable, a second mental process is essential to the certitude requisite for affirmative action. There must necessarily be the same belief in the accuracy and veracity of the witness. It is necessary that a second step be taken. In the ordinary course of events, the fact proved and the fact to be established must so commonly and usually coexist that the existence of the one renders probable to the mind of the tribunal the existence of the other. This second step — the *logical inference* of the existence of the unknown from proof of the known — is a "presumption." Strictly speaking, therefore, all presumptions are of fact. The entire probative force of circumstantial evidence consists in this: it suggests an inference, or, as the phrase is, "raises a presumption" as to the existence of a fact in issue. 1 Greenl. Ev. § 14; Richmond *v.* Aiken, 25 Vt. 324; McAleer *v.* McMurray, 58 Pa. St. 126; O'Gara *v.* Eisenlohr, 38 N. Y. 296; People *v.* Hessing, 28 Ill. 410; Pennington *v.* Yell, 11 Ark. 212; Manning *v.* Ins. Co., 100 U. S. 693.

(*b*) *Presumption of Law.* — "A presumption of law derives its force from *jurisprudence* as distinguished from *logic*." 2 Whar. Ev. § 1237. It is a certain use, made by law, of a presumption of fact, as above defined. (Conf. § 265, n. 1, *b* (2)). More strictly speaking, it is an "assumption" of the law rather than a presumption. Presumptions of fact are obviously of varying weight, — in accordance with the closeness of connection between the fact established and the fact in issue, as the inference of the one from the existence of the other is more or less necessary. The law, for its own purposes, segregates certain of the stronger presumptions of fact, and assumes that the inference is the correct one, unless and until evidence is introduced to prove that it is not. When such evidence is introduced, the legal assumption or "presumption of law" is at an end as such, leaving the presumption of fact upon which the assumption was founded — as a presumption of fact — *i. e.*, as evidence, to take its place with the other evidence in the case. But until such evidence is introduced, there is no necessity of introducing facts to prove what the law will assume as true. It is considered that a *prima facie* case is established. (Conf. § 42, *supra*.) Vanburen *v.* Cockburn, 14 Barb. 118; Ely *v.* Ely, 6 Gray, 439; U. S. *v.* Wiggins, 14 Pet. 334, 348; Com. *v.* Pike, 49 N. H. 399; Graves *v.* Colwell, 90 Ill. 612. Such a presumption may be created either by statute or by judicial legislation. See, on this subject, an exhaustive opinion by Gray, C. J., in Holmes *v.* Hunt, 122 Mass. 505. A few of the more usual presumptions of law may be cited as illustrations.

(1) *Presumption of Death.* — A person not heard from for the space of seven years by those who would probably have heard from him if alive is presumed to be dead. (Conf. § 409, *infra*.) 1 Greenl. Ev. § 41; Winship *v.* Conner, 42 N. H. 341; Burr *v.* Sim, 4 Whart.

150; Giles *v.* Morrow, 1 Ont. Rep. 527; Johnson *v.* Merithew, 80 Me. 111; Dowd *v.* Watson, 105 N. C. 476; Thomas *v.* Thomas, 16 Neb. 553; Spencer *v.* Roper, 13 Ired. L. 333; Primm *v.* Stewart, 7 Tex. 178; Whiting *v.* Nicholl, 46 Ill. 230; Osborn *v.* Allen, 26 N. J. L. 388; Youngs *v.* Heffner, 36 Oh. St. 232; Flynn *v.* Coffee, 12 Allen, 133; Adams *v.* Jones, 39 Ga. 479; Smith *v.* Smith, 49 Ala. 156; Learned *v.* Corley, 43 Miss. 687, 709; Sheldon *v.* Ferris, 45 Barb. 124; Wentworth *v.* Wentworth, 71 Me. 72; State *v.* Henke, 12 Northwest. Rep. 477. The exact time at which death will be presumed to have taken place is somewhat in dispute. It has been held that death will be presumed at the end of seven years. Eagle *v.* Emmet, 4 Bradf. (N. Y.) 117; Doe *v.* Strong, 4 U. C. Q. B. 510; Clarke *v.* Canfield, 15 N. J. Ch. 119; Shown *v.* McMackin, 9 B. J. Lea, 601, 608; Smith *v.* Knowlton, 11 N. H. 197. Conf. B. V. (*d*) of this note, *infra*. The prevailing and better opinion, however, is that there is no presumption whatever as to date of death within the seven years. The *onus* is on the one whose case demands proof of death at any particular period. Whiting *v.* Nicholl, 46 Ill. 230, 241; Doe *v.* Strong, 4 U. C. Q. B. 510, confirmed 8 U. C. Q. B. 291; Howard *v.* State, 75 Ala. 27; Whiteley *v.* Equitable Soc'y, 72 Wis. 170; Tisdale *v.* Ins. Co., 26 Ia. 170; McCartee *v.* Camel, 1 Barb. (N. Y.) Ch. 455; Spencer *v.* Roper, 13 Ired. L. 333; Hancock *v.* Ins. Co., 62 Mo. 26; Puckett *v.* State, 1 Sneed, 355.

(2) *Ownership.* — The possession of property raises a presumption of ownership. Currier *v.* Gale, 9 Allen, 522; Finch *v.* Alston, 2 S. & P. 83; Drummond *v.* Hopper, 4 Harr. (Del.) 327; Vining *v.* Baker, 53 Me. 544; Ward *v.* McIntosh, 12 Oh. St. 231; Fish *v.* Skut, 21 Barb. 333; Baxter *v.* Ellis, 57 Me. 178; Goodwin *v.* Garr, 8 Cal. 615; Succession of Alexander, 18 La. An. 337; Hovey *v.* Sebring, 24 Mich. 232; Vastine *v.* Wilding, 45 Mo. 89; Fletcher *v.* Fuller, 120 U. S. 534.

(3) *Legitimacy.* — So children born in wedlock are presumed to be legitimate. Stegall *v.* Stegall, 2 Brock. 256; Phillips *v.* Allen, 2 Allen, 453; Strode *v.* Magowan, 2 Bush, 621; Dinkins *v.* Samuel, 10 Rich. 66; Ill. Land Co. *v.* Bonner, 75 Ill. 315; Stoke *v.* Worthingham, 23 Minn. 528. For rebutting evidence of non-access, see Herring *v.* Goodson, 43 Miss. 392. Conf. Caujolle *v.* Ferrie, 23 N. Y. 90. The presumption is a strong one, and is met only by proof of non-access. Scott *v.* Hillenberg, 85 Va. 245; Pittsford *v.* Chittenden, 58 Vt. 49. Wife is not allowed to testify to non-access during a time when the husband might have had access. Mink *v.* State, 60 Wis. 583. But see Goss *v.* Froman, 89 Ky. 318.

(4) *Alterations.* — It may be added, that it by no means follows that judges draw the same presumption, as a rule of law, from the same state of facts: thus, when an alteration is presumed to have been made in a will or deed is a matter in conflict. 1 Greenl. Ev. § 564. In Pennsylvania the alteration is presumed to have been made before execution, "on the theory of innocence," it is said. Wikoff's Appeal, 15 Pa. St. 281, 290. On the other hand, in New Hampshire, the alteration is presumed to have been made after execution. Burnham *v.* Ayer, 35 N. H. 351; following Hills *v.* Barnes, 11 N. H. 395, which is a case of negotiable paper (conf. *infra* in this note). As to alterations in negotiable paper, see Simpson *v.* Stackhouse, 9 Barr, 186; Humphreys *v.* Guillow, 13 N. H. 385; Davis *v.* Carlisle, 6 Ala. 707; Clark *v.* Eckstein, 22 Pa. St. 507. As to so-called "contemporaneous alterations," see B. V. (*b*) of this note. Possibly the more correct expression of the rule would be that there is no presumption in the matter. The party relying on a document must satisfactorily explain all suspicious phenomena connected with it. Newcomb *v.* Presbrey, 8 Metc. 406; Bailey *v.* Taylor, 11 Conn. 531; Coulson *v.* Walton, 9 Pet. 62, 77; Wilde *v.* Armsby, 6 Cush. 314; Jordan *v.* Stewart, 23 Pa. St. 244; Huntington *v.* Finch, 3 Oh. St. 445; Milliken *v.* Marlin, 66 Ill. 13; Boothby *v.* Stanley, 34 Me. 515; No. Riv. Mead. Co. *v.* Shrewsbury Church, 22 N. J. L. 424.

New Presumptions of Law. — Presumptions of law, from the nature of the case, can hardly be considered a fixed body of rules. Founded upon the strong inference which a given fact suggests of the existence of a fact in issue by reason of the usual coexistence of the two in the daily experience of judges, such presumptions must necessarily alter as the changed condition of social or physical surroundings modifies that experience. As Dr. Wharton well illustrates (2 Whar. Ev. § 1232), "That a man who was in London seven days ago cannot be in Rome to-day; that information known only at London this morning cannot be known at Rome this afternoon," — were irrebuttable presumptions of law to mediæval schoolmen. To-day the presumption, if any, would be exactly the reverse.

The list of legal presumptions opens, therefore, to admit new presumptions, or to discard old ones. The process is constant. As will perhaps be seen more clearly in B. V. of this note, the chief object and effect of a legal presumption is to affect the *onus* of introducing evidence. (Conf. § 265, n. 1 (*b*).) In many instances, therefore, the court, when called upon to rule with regard to the "burden of evidence," is in reality establishing a presumption of law. As presumptions of law are rules of law, within the judicial cognizance of the judge (conf. § 253, *supra*), and as the judge is also required to take judicial cognizance of all matters of general knowledge, there exists a natural though perhaps illogical tendency for courts to raise presumptions of law from the stronger and more universal coincidences of fact which are matters of general knowledge or common occurrence. But the presumption of fact must, it seems, be a strong one. Bach *v.* Cohn, 3 La. An. 101. Thus, it has been ruled that there is no presumption of law that a drop-letter was deposited in the post-office on the date of its postmark. Bank *v.* Townsley, 102 Mass. 177. But see New Haven Bank *v.* Mitchell, 15 Conn. 206; Callan *v.* Gaylord, 3 Watts, 321; Hedden *v.* Roberts, 134 Mass. 38. So also it has been held that the fact that a telegraph message has been transmitted from a certain place does not, as a presumption of law, prove the presence of the sender at that place at the time of sending. Hawley *v.* Whipple, 48 N. H. 487.

B. Various Meanings of the Term "Presumption." — The ambiguity attending the use of the term "presumption" becomes easily explainable by some consideration of the numerous distinct senses in which this same term has been used. As has been pointed out by Professor Thayer of Cambridge, "presumption" has been commonly and often interchangeably used with at least seven distinct meanings. Thus: —

I. That a certain fact or set of facts furnishes evidence of another, — that it furnishes an inference of another. This is the so-called "presumption of fact," as above defined.

II. That a certain fact or set of facts is not merely *evidence* (as stated in I.), but is sufficient evidence of another, in the absence of any evidence to the contrary. Such fact or set of facts, in other words, furnishes in itself a sufficient ground of inference; *i. e.*, makes out a *prima facie* case, — nothing being here said with regard to the evidentiary force of such facts when combined with conflicting evidence to the same point. This is the strict "presumption of law," as above defined, — a presumption of law, *as such*, having no evidentiary force. I. and II. are the only "presumptions," strictly so called, known to the law.

III. That a certain fact or set of facts not only furnishes evidence of another fact, or sufficient evidence of it in the absence of any contrary evidence whatever, but that it makes out a case which shall stand till it is overthrown by a specific quantity of evidence; *i. e.*, (*a*) by such quantity of evidence as a jury will be justified in acting on; (*b*) by a preponderance of all the evidence in the case; or (*c*) by evidence preponderating to that extent that no reasonable doubt exists.

Of these uses of the term, (*a*) is "presumption of law," — as frequently employed, though the term in this sense is obviously a ruling with regard to the weight in evidence of the facts upon which the strict presumption of law is founded. Dinkins *v.* Samuel, 10 Rich. (S. C.) 66; People *v.* Garbutt, 17 Mich. 9, 23; Knisely *v.* Sampson, 100 Ill. 573; Hale *v.* Pack, 10 W. Va. 145; Underwood *v.* Hossack, 38 Ill. 208, 212.

(*b*) (*c*) *Sanity in Criminal Cases.* — Of the three meanings in which the term "presumption" is used in this sense, (*b*) and (*c*) are, in most instances, simply a restatement of the rules regulating the "burden of proof" in one of its double senses. Conf. § 265, n. 1, (*a*) and (*b*). A practically equivalent statement would be, that he who has the "burden of establishing" must make good his position by a certain preponderance of evidence; or that he who has the "burden of evidence" must introduce a certain *quantum*. Of this nature is Mr. Justice Stephen's "Presumption of Innocence" (Dig. Law. Ev., art. 94), which, it will be noticed, applies alike to civil and criminal actions. It is also apparently in this sense that the term is used in the so-called "presumption of sanity" in criminal cases; viz., (*b*) It has been held that it is for the prisoner to establish insanity by a preponderance of the evidence. Com. *v.* Eddy, 7 Gray, 583; Caraness *v.* State, 43 Ark. 331; Maxwell *v.* State, 89 Ala. 150; King *v.* State, 91 Tenn. 617; Lynch *v.* Com., 77 Pa. St. 205; State *v.* Redemeier, 71 Mo. 173;

State *v.* Lawrence, 57 Me. 574; People *v.* Coffman, 24 Cal. 230; State *v.* Bruce, 48 Ia. 530. (*c*) In a criminal case it has also been held that insanity is to be established beyond a reasonable doubt. State *v.* Spencer, 1 Zabr. 196, 202; Baccigalupo's case, 33 Grat. 807, 817. See McAllister *v.* State, 17 Ala. 434. This, however, cannot be taken to be the undisputed doctrine of the American courts. The better opinion seems likely to prevail; *i. e.*, that it is for the government to establish sanity, when disputed, beyond reasonable doubt. Whar. Homicide, § 666; Guetig *v.* State, 66 Ind. 94; O'Connell *v.* People, 87 N. Y. 377; Pomeroy's case, per Gray, C. J., cited Whar. Hom. Appendix; Armstrong *v.* State, 27 Fla. 366; State *v.* Jones, 50 N. H. 369; People *v.* Garbutt, 17 Mich. 9; State *v.* Crawford, 11 Kans. 32. Conf. s. c. 23 Amer. L. Reg. 21, where the cases are very fully discussed. See § 265, n. 1, *supra*. Conf. U. S. *v.* Lawrence, 4 Cranch, C. Ct. 514; U. S. *v.* McGlue, 1 Curt. 1; O'Brien *v.* People, 48 Barb. 274. Sanity in this connection is a strict presumption of law to the extent of being founded upon a presumption of fact, a man being presumed sane for exactly the same reason that he is presumed a biped, — because men usually are. O'Donnell *v.* Rodiger, 76 Ala. 222.

In civil cases sanity is a strict presumption of law. When sanity is put in dispute by opposing testimony, it must be proved by a preponderance of the evidence, regard being had, as always, to the presumption of fact upon which such presumption of law is based. O'Donnell *v.* Rodiger, 76 Ala. 222; Miller *v.* Rutledge, 82 Va. 863. Thus in case of a will. Crowninshield *v.* Crowninshield, 2 Gray, 524; Runyan *v.* Price, 15 Oh. St. 1; Dean *v.* Dean, 1 Williams (Vt.), 746; Egbert *v.* Egbert, 78 Pa. St. 326; Hawkins *v.* Grimes, 13 B. Monr. 257; Evans *v.* Arnold, 52 Ga. 169; Delafield *v.* Parish, 25 N. Y. 9; Comstock *v.* Hadlyme Eccl. Soc., 8 Conn. 254, 261; Taff *v.* Hosmer, 14 Mich. 309; Perkins *v.* Perkins, 39 N. H. 163. See also Robinson *v.* Adams, 62 Me. 369; Turner *v.* Cheesman, 15 N. J. Ch. 243. So in other civil cases. Jarrett *v.* Jarrett, 11 W. Va. 584; Lilly *v.* Waggoner, 27 Ill. 395; Hoge *v.* Fisher, 1 Pet. C. Ct. 163.

IV. The term "presumption" is used as fixing the legal meaning of facts, as determining that a certain fact is the equivalent, in legal import, of another fact. Of this nature is the meaning often attached to the so-called presumption of malice. "Homicide being shown, and no justification or excuse appearing, the killing is presumed to be with malice." 1 Greenl. Ev. § 34; Com. *v.* York, 9 Metc. 93; Sylvester *v.* State, 72 Ala. 201; State *v.* Potts, 100 N. C. 457; Gibson *v.* State, 89 Ala. 121; Marshall *v.* State, 74 Ga. 26. See, however, Com. *v.* Hawkins, 3 Gray, 463; Lamar *v.* State, 63 Miss. 265; Hogan *v.* State, 61 Ga. 43; State *v.* Trivas, 32 La. An. 1086; Schlenker *v.* State, 9 Brown (Neb.), 241, 248; Epperson *v.* State, 5 B. J. Lea (Tenn.), 291, 299; People *v.* March, 6 Cal. 543. There is reason to think that in essence, and historically, this so-called "presumption" is a rule of construction, — a canon of judicial interpretation. The question naturally arose in cases of special verdicts. The jury in the preparation of such verdicts used the simple word "killing" without more. On hearings in banc, courts were of opinion that, had there been excuse or justification, the jury would probably have inserted it in fulfilment of their duty; and nothing of the kind appearing, the word "killing" must be interpreted to mean voluntary killing; and voluntary killing, without more, must be interpreted to mean "killing with malice," — facts of justification or excuse being assumed not to exist. R. *v.* Plummer, Kelyng, 109 (1701); 1 Russ. Crimes, 5th Eng. Ed., 641–644; 1 Hale, P. C. 440–443; 1 Foster's Crown Law, 261, 290; Dyer's Cases, 128 b. The rule is a necessary corollary of the doctrine, still in force, that a special verdict must find all substantive facts. Brown *v.* Ralston, 4 Rand. 504; Seward *v.* Jackson, 8 Cowen, 406; Thompson *v.* Farr, 1 Speers, 93; Langley *v.* Warner, 3 Comst. 327; State *v.* Watts, 10 Ired. L. 369; Blake *v.* Davis, 20 Ohio, 321. To change this rule of construction into a rule of evidence — that when, on the trial of a cause, killing appears, and nothing further, such killing is presumed to be with malice — is quite a different and more serious matter. It is, as must be obvious, the difference between regarding malice as so essential a part of the government's case that it must be assumed to have been proved, if nothing appears to the contrary, and regarding it as so unimportant a part that it need not be proved at all, under certain circumstances. Com. *v.* Hawkins, 3 Gray, 463; State *v.* Patterson, 45 Vt. 308. The practical mischief of the conversion is, however, affected by the circumstance that it seldom or never

happens that, in considering evidentiary facts, "killing" appears, and nothing further. Conf. Wharton, Homicide, §§ 669, 671; Stokes *v.* People, 53 N. Y. 164; State *v.* Knight, 43 Me. 11.

V. As meaning a negative thing; viz., that the contrary of that which is said to be presumed is not to be taken as true without evidence of the fact, *i. e.*, as regulating the "burden of proof." (Conf. § 265, n. 1, *b* (2).) Weiss *v.* R. R. Co., 79 Pa. St. 387.

(*a*) *Fraud.* — An illustration is the so-called "presumption against fraud," — it being meant that fraud will not be assumed without evidence. In other words, he who charges fraud must prove it. Hatch *v.* Bayley, 12 Cush. 27 (compare Jones *v.* McLeod, 103 Mass. 58); Thomes & Co. *v.* Rembert's Adm'r, 63 Ala. 561; Kline *v.* Baker, 106 Mass. 61, 66; Horan *v.* Weiler, 41 Pa. St. 470; Seals *v.* Robinson, 75 Ala. 363; Schreyer *v.* Scott, 134 U. S. 405; Huchberger *v.* Ins. Co., 5 Bissell, 106. It is apparently reversing the statement without affecting the meaning to say that "good faith is presumed." 2 Whar. Ev. § 1248; Greenwood *v.* Lowe, 7 La. An. 197; Mandal *v.* Mandal, 28 La. An. 556; Richards *v.* Kountze, 4 Neb. 200; Calvert *v.* Carter, 18 Md. 73, 85; Hager *v.* Thompson, 1 Black. 80, 91; Weybrich *v.* Harris, 31 Kans. 92; New Portland *v.* Kingfield, 55 Me. 172; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) Ch. 7. See also Marksbury *v.* Taylor, 10 Bush, 519; Young *v.* Edwards, 72 Pa. St. 257, 267; Vanbibber *v.* Beirne, 6 W. Va. 168.

(*b*) *Alterations.* — So, it is said, the alteration of an instrument will, as a matter of law, be presumed to have been made contemporaneously with its execution, — the meaning being, if circumstances of suspicion are claimed to exist, they must be made to appear, or accounted for, as the case may be. Davis *v.* Jenney, 1 Metc. 221; Bailey *v.* Taylor, 11 Conn. 531, 534; Boothby *v.* Stanley, 34 Me. 515; No. Riv. Mead. Co. *v.* Shrewsbury Church, 22 N. J. L. 424; Smith *v.* U. S., 2 Wall. 219, 232.

(*c*) *Presumption against Change.* — So there is a presumption of law against change: a given state of affairs, a course of dealing or action, once proved to exist, continues to exist. In other words, if you wish to show the contrary, you must prove it. Conf. 1 Greenl. Ev. § 41; Littlefield *v.* Brooks, 50 Me. 475; Whilden *et al. v.* Bank, 64 Ala. 1; Blackburn *v.* State, 23 Oh. St. 146; Eames *v.* Eames, 41 N. H. 177; Wright *v.* Jackson, 59 Wis. 569; Barrett *v.* Stradl, 73 Wis. 385; Clements *v.* Hays, 76 Ala. 280; Boozer *v.* Teague, 27 S. C. 348; Titlow *v.* Titlow, 54 Pa. St. 216; Ripley *v.* Babcock, 13 Wis. 425; O'Neil *v.* N. Y., &c. Mining Co., 3 Nev. 141; Mullen *v.* Pryor, 12 Mo. 307; Sullivan *v.* Goldman, 19 La. An. 12; Rixford *v.* Miller, 49 Vt. 319; Wilkins *v.* Earle, 44 N. Y. 172; Leport *v.* Todd, 32 N. J. L. 124; Goldie *v.* McDonald, 78 Ill. 605; Jay *v.* Carthage, 48 Me. 353; Daniels *v.* Hamilton, 52 Ala. 105. Such a continuance is not taken to be indefinite. A natural duration is presumed. Allen *v.* Brown, 83 Ga. 161; Scott *v.* Wood, 81 Cal. 398. See also, Adams *v.* Slate, 87 Ind. 573; In re Huss, 126 N. Y. 537. So in adulterous intercourse. People *v.* Stokes, 71 Cal. 263.

(*d*) *Presumption of Life.* — In like manner a person once shown to be alive is presumed to continue alive. (Conf. A. *b* (1), of this note.) Battin *v.* Bigelow, 1 Pet. C. Ct. 452, Gilleland *v.* Martin, 3 McLean, 490; Stevens *v.* McNamara, 36 Me. 176; Matter of Hall, 1 Wall. Jr. 83; Spears *v.* Burton, 31 Miss. 547.

(*e*) *Illegality.* — It is in the same manner presumed that every man obeys the mandates of the law in his official and social relations. The contrary must be established by evidence. U. S. *v.* Weed, 5 Wall. 62; Coxe *v.* Deringer, 82 Pa. St. 236; Morrison *v.* King, 62 Ill. 30; Kobs *v.* Minneapolis, 22 Minn. 159; Cooper *v.* Granberry, 33 Miss. 117; Isbell *v.* N. Y. & N. H. R. R., 25 Conn. 556; Cobb *v.* Newcomb, 7 Clarke (Ia.), 43; State *v.* Wenzel, 77 Ind. 428; Guy *v.* Washburn, 23 Cal. 111; Jones *v.* Muisbach, 26 Tex. 235; Wood *v.* Morehouse, 45 N. Y. 368; Shorey *v.* Hussey, 32 Me. 579; Drake *v.* Mooney, 31 Vt. 617; Jones *v.* Boston, 104 Mass. 461; Dupuis *v.* Thompson, 16 Fla. 69; Henry *v.* Dulle, 74 Mo. 443; Mathews *v.* Buckingham, 22 Kans. 166.

(*f*) *Date.* — So a date is presumed to be true. Fowler *v.* Merrill, 11 How. 375, 393; Smith *v.* Porter, 10 Gray, 66; Livingston *v.* Arnoux, 56 N. Y. 507, 519; Ellsworth *v.* R. R., 34 N. J. L. 93; Meadows *v.* Cozart, 76 N. C. 450; Savery *v.* Browning, 18 Ia. 246; Dodge *v.* Hopkins, 14 Wis. 630; Knisely *v.* Sampson, 100 Ill. 573.

(*g*) *Verdict.* — So a verdict is presumed to be correct. In other words, the party who

wishes it set aside has the onus of legally establishing its incorrectness. Hilliard on New Trials, ch. 2, § 2; U. S. *v.* White, 5 Cranch, C. Ct. 73; Pittsburg R. R. *v.* Ramsay, 22 Wall. 322; Addington *v.* Allen, 11 Wend. 374; Wagers *v.* Dickey, 17 Ohio, 439; Beale *v.* Com., 25 Pa. St. 11; State *v.* Farish, 23 Miss. 483; Cochlin *v.* People, 93 Ill. 410.

(*h*) *Presumption of Payment.* — As to the presumption of payment from lapse of time and other circumstances, see Jackson *v.* Wood, 12 Johns. 242; Miller *v.* Evans, 2 Cranch, C. Ct. 72; Helm *v.* Jones, 3 Dana (Ky.), 86; Bird *v.* Inslee, 23 N. J. Eq. 363; Halfin *v.* Winkleman, 83 Tex. 165; Long *v.* Straus, 124 Ind. 84; Carroll *v.* Bowie, 7 Gill (Md.), 34; Reed *v.* Reed, 46 Pa. St. 239, 242; Stockton *v.* Johnson, 6 B. Monr. 408; Hale *v.* Pack, 10 W. Va. 145; Jarvis *v.* Albro, 67 Me. 310; Milledge *v.* Gardner, 33 Ga. 397; Pope *v.* Dodson, 58 Ill. 360; Robinson *v.* Allison, 36 Ala. 525; Conn. Trust Co. *v.* Melendy, 119 Mass. 449; Doty *v.* Janes, 28 Wis. 319; Garnier *v.* Renner, 51 Ind. 372.

(*i*) *Regularity.* — So regularity in business or official dealing will be presumed, in the sense that the burden of proof is on the party who wishes the tribunal to believe that the opposite is true. Hartford Ins. Co. *v.* Gray, 80 Ill. 28; Burr *v.* Williams, 23 Ark. 244; New Haven Bank *v.* Mitchell, 15 Conn. 206. So the mailing of a letter is *prima facie* evidence of its delivery. Lindenburger *v.* Beall, 6 Wheat. 104; Russell *v.* Buckley, 4 R. I. 525; Shoemaker *v.* Bank, 59 Pa. St. 79; Plath *v.* Ins. Co., 23 Minn. 479; Briggs *v.* Hervey, 130 Mass. 186; Eckerley *v.* Alcorn, 62 Miss. 228; De Jarnette *v.* McDaniel, 93 Ala. 215; German Bank *v.* Burns, 12 Col. 539; Folsom *v.* Cook, 115 Pa. St. 539; *contra*, Sullivan *v.* Kuykendall, 82 Ky. 483; Boon *v.* Ins. Co., 37 Minn. 426. So also of a telegram. White *v.* Flemming, 20 Nova Scotia, 335; Oregon Co. *v.* Otis, 100 N. Y. 446. But see First Nat. Bank of Bellefonte *v.* McManigle, 69 Pa. St. 156.

(*k*) *Lex Fori.* — So the common law, civil and criminal, of another State, is presumed to be the same as the *lex fori*, in the absence of proof to the contrary. Cox *v.* Marrow, 14 Ark. 603; Bundy *v.* Hart, 46 Mo. 460; Plock & Co. *v.* Cobb, 64 Ala. 127, 156; Crake *v.* Crake, 18 Ind. 156; Hill *v.* Grigsby, 32 Cal. 55; Walsh *v.* Dart, 12 Wis. 635; Bemis *v.* McKenzie, 13 Fla. 553; Bramhall *v.* Van Campen, 8 Minn. 13; Green *v.* Rugely, 23 Tex. 539; Com. *v.* Kenney, 120 Mass. 387; Hynes *v.* McDermott, 82 N. Y. 41.

The presumptions ranging themselves under this head are commonly classed as presumptions of law. They seem to fail of being such in this, that they are infrequently founded upon presumptions of fact, or if so founded, to a very limited extent. It may well be questioned, for example, whether it require any further evidence to establish fraud than would be required if there were no so called "presumption" against it. Young *v.* Edwards, 72 Pa. St. 257, 267.

VI. As meaning another negative thing; viz., that neither a certain fact, nor the contrary of that fact, shall be assumed to be true without evidence, it being sometimes said that a neutral fact is presumed. In other words, that there is, in reality, no presumption in the matter. Thus, in case of the loss of several persons by shipwreck or other common cause, all are presumed, it is said, to have perished together; what is meant being that there is no presumption as to survivorship. 1 Greenl. Ev. §§ 30, 41; Kans. Pac. R. R. *v.* Miller, 2 Col. T. 442, 464; Hartshorne *v.* Wilkins, 2 Oldr. 276; Johnson *v.* Merithew, 80 Me. 111; Sanders *v.* Simcich, 65 Cal. 50; Bonacina *v.* Bonacina, 10 L. C. R. 79; Newell *v.* Nichols, 12 Hun, 604; Coye *v.* Leach, 8 Metc. 371; Smith *v.* Croom, 7 Fla. 81; Russell *v.* Hallett, 23 Kans. 276. See also Pell *v.* Ball, Cheves (S. C.) Ch 2, 99.

VII. As expressing, in a merely rhetorical or figurative way, a doctrine of positive law or procedure.

(*a*) *Presumption of Innocence.* — Thus it has been said a man is legally to be presumed innocent of crime until proved to be guilty. (Conf. § 346, *infra*.) 1 Greenl. Ev. § 35 and notes; U. S. *v.* Gooding, 12 Wheat. 460, 471; U. S. *v.* Douglass, 2 Blatch. 207; Squire *v.* State, 46 Ind. 459; Hutto *v.* State, 7 Tex. Ct. App. 44; Sharp *v.* Johnson, 22 Ark. 79; Klein *v.* Laudman, 29 Mo. 259; West *v.* State, 1 Wis. 209; Wright *v.* Skinner, 17 C. P. U. C. 317; Hawes *v.* State, 88 Ala. 37. Obviously, this "presumption of innocence" is not a presumption of law strictly so-called (see A. (*b*) of this note), — it being in no sense true that a majority of persons accused of crime are innocent in point of fact. Apparently, all that is meant is this: if a man be accused of crime, he must be proved guilty, and proved so beyond a reasonable doubt. (Conf. Steph. Dig. Law Ev., art.

94.) 10 Am. L. R. 642 ; 2 Greenl. Ev. §§ 408, n., 426, n. ; Morehead *v.* State, 34 Oh. St. 212, 217 ; Hemingway *v.* State, 68 Miss. 371.

(*b*) *Ignoratio legis neminem excusat.* — It is also said "every one is conclusively presumed to know the law." Not that, as a matter of fact, every one does know the law ; that which cannot be predicated of the most learned will hardly be assumed in the most ignorant. See 2 Whar. Ev. § 1240 ; Martindale *v.* Faulkner, 2 C. B. 719, per Maule, J. The presumption is a rhetorical paraphrase for the statement that ignorance of law is no defence to legal liability. U. S. *v.* Learned, 11 Int. Rev. Record, 149 ; U. S. *v.* Antony, 11 Blatch. 200 ; Com. *v.* Bagley, 7 Pick. 279 ; Winehart *v.* State, 6 Ind. 30 ; Black *v.* Ward, 27 Mich. 191 ; Whitton *v.* State, 37 Miss. 379 ; R. *v.* Mailloux, 3 Pug. 493. The matter is largely one of public policy. A commonly received misconstruction of law has been, in certain cases, either sustained or excused. Brent *v.* State, 43 Ala. 297 ; Kostenbader *v.* Spotts, 80 Pa. St. 430. Conf. Calais, &c. Co. *v.* Van Pelt, 2 Black, 372 ; Gauldin *v.* Shehee, 20 Ga. 531 ; Cutter *v.* State, 36 N. J. L. 125 ; Upton *v.* Tribilcock, 91 U. S. 45 ; Miller *v.* Proctor, 20 Oh. St. 442 ; Morrill *v.* Graham, 27 Tex. 646 ; Marsh *v.* Whitmore, 21 Wall. 178 ; King *v.* Doolittle, 1 Head (Tenn.), 77.

(*c*) *Consequences of Action.* — So it is said that every one is presumed to intend the natural consequences of his acts, the idea being that he will be held equally responsible as if he had intended. Like (*b*), *supra*, this is merely a fantastic transference into the law of evidence of the phraseology of positive law. Mears *v.* Graham, 8 Blackf. 144 ; Harris *v.* Story, 2 E. D. Smith, 363 ; Androscoggin Bank *v.* Kimball, 10 Cush. 373 ; Clem *v.* R. R. Co., 9 Ind. 488 ; Jones *v.* Ricketts, 7 Md. 108. See also People *v.* Orcutt, 1 Parker, C. R. 252. So also in civil cases a man is supposed to consult his own interest, and be able to forecast the probable results of his conduct. In other words, carelessness is not a ground of relief from legal liability. Burton *v.* Blin, 23 Vt. 151 ; Grace *v.* Adams, 100 Mass. 505 ; Germania Ins. Co. *v.* R. R., 72 N. Y. 90 ; Burritt *v.* Dickson, 8 Cal. 113 ; Ryan *v.* Ins. Co., 41 Conn. 168 ; South. Ins. Co. *v.* Yates, 28 Grat. 585 ; Hartf. Ins. Co. *v.* Gray, 80 Ill. 28.

(*d*) *Burden of Proof.* — The phrase *præsumitur pro negante* stands on substantially the same footing ; it is another statement of the rules regulating the burden of proof. Conf. § 265, n. 1 (*a*).

(*e*) *Carrier.* — So the so-called presumption that loss of goods by a common carrier is a negligent one, the meaning being that, as a matter of substantive law, a carrier is an insurer, and negligence is immaterial. (Conf. § 430.)

Under this head should be classed the so-called conclusive presumptions of law. See § 43, n. 1.

(§ 309) *Fictions of law.* — Conf. Maine's Anc. Law, 21 *et seq.* For a modern instance of a fiction of law reference may be had to the rule regulating suits in the federal courts between corporations owing their charters to different States. The Judiciary Act of 1789, § 11 (1 Stat. at Large, 78), gives the circuit courts of the United States jurisdiction over suits between citizens of different States. Now a corporation aggregate is not a citizen, within the meaning of this provision ; that was early settled. Hope Ins. Co. *v.* Boardman, 5 Cranch, 57 ; Bank of U. S. *v.* Deveaux, 5 Cranch, 61 ; Bank of Augusta *v.* Earle, 13 Pet. 519 ; Wood *v.* Hartford Ins. Co., 13 Conn. 202. The difficulty in acquiring the necessary jurisdiction has been obviated by a fiction, — it being conclusively presumed (the expression may be noted) that the members of the respective corporations are citizens of the State to which such litigant corporations owe their respective charters. Railway Co. *v.* Whitton, 13 Wall. 270, 284 ; Ohio & Miss. R. R. *v.* Wheeler, 1 Black, 286 ; Drawbridge Co. *v.* Shepherd, 20 How. 227 ; Man'f'r's' N. Bank *v.* Baack, 2 Abb. (U. S.) 232 ; Mullen *v.* Dows, 4 Otto (94 U. S.), 444.

Sub-Section III.

CONFLICTING PRESUMPTIONS.

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§ 328. It is obvious from what has been already said, that the maxim, "Stabitur præsumptioni donec probetur in contrarium" (*z*), must be understood with considerable limitation. That maxim is obviously inapplicable either to irrebuttable presumptions (*præsumptiones juris et de jure*), whose very nature is to exclude all contrary proof, or to those presumptions of fact which have been denominated slight (*præsumptiones leviores*). And it is, therefore, necessarily restricted to such presumptions of law or fact, mixed presumptions, and pieces or masses of presumptive evidence, as throw the burden of proof on the parties against whom they militate.

§ 329. Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence (*a*); and the court may even take judicial notice of a fact — such, for example, as the increase in the value of money — for the purpose of rebutting a presumption, which would otherwise have arisen from uninterrupted modern usage (*b*). Again, it not unfrequently happens that the same facts may, when considered in different points of view, form the bases of opposite inferences; and in either of these cases it becomes necessary to determine the relative weight due to the conflicting presumptions. The relative weight of conflicting presumptions of *law* is, of course, to be determined by the court or judge, — who should also direct the attention of the jury to the burden of proof as affected by the

(*z*) Co. Litt. 373 b; 2 Co. 48 a; 2 Co. 73 b; Hob. 297; Jenk. Cent. 1, Cas. 62; 3 Bl. C. 371.

(*a*) *Brady* v. *Cubitt*, 1 Dougl. 31, 39, per Lord Mansfield; *Jayne* v. *Price*, 5 Taunt. 326, 328, per Heath, J.; *R.* v. *The Inhabitants of Harborne*, 2 A. & E. 540; *Rickards* v. *Mumford*, 2 Phillim. 24, 25, per Sir John Nicholl; *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 267; *Simpson* v. *Dendy*, 8 C. B. N. S. 433; Menoch. de Præs. lib. 1, quæst. 29, 30, 31; Mascard. de Prob. Concl. 1231.

(*b*) *Bryant* v. *Foot*, L. Rep., 2 Q. B. 161; *S. C.* (in Cam. Scac.) 3 *Id.* 497.

pleadings, and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognised by law, and have their origin in natural equity and convenience. It must not, however, be supposed that every præsumptio juris is, *ex vi termini*, stronger than every præsumptio hominis, or præsumptio mixta; on the contrary, which of any two presumptions ought to take precedence must be determined by the nature of each. The presumption of innocence, for instance, is præsumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent possession of stolen property (*c*), — which is at most only præsumptio mixta.

§ 330. The subject of conflicting presumptions seems almost to have escaped the notice of the writers on English law; but several rules respecting it have been laid down by civilians. Some of these are, perhaps, questionable (*d*); but the following appear sound in principle, and provided they are understood as being merely rules for general guidance, and not rules of universal obligation, they are likely to be serviceable in practice.

§ 331. I. *Special presumptions take precedence of general* (*e*). This is the chief rule; and it seems a branch of the more general principle, "In toto jure generi per speciem derogatur" (*f*). It rests on the obvious principle that as all general inferences (except, of course, such as are juris et de jure) are rebuttable by direct proof,

(*c*) *Suprà*, bk. 2, pt. 2.

(*d*) In addition to those mentioned in this chapter, Menochius gives the following (De Præsumptionibus, lib. 1, quæst. 29. See also *Id.* de Arbitrariis Judicum, lib. 2, casus 472): "1. Præsumptio quæ à substantiâ provenit, dicitur potentior illâ quæ descendit à solemnitate. 2. Præsumptio judicatur potentior quæ est benignior. 3. Præsumptio judicatur firmior et potentior, quæ juri communi inhæret, et illa debilior quæ juri speciali. 4. Præsumptio est validior et potentior, quæ verisimilitudini magis convenit. 5. Præsumptio quæ descendit à quasi possessione est potentior illâ, quæ est, quod quælibet res præsumatur libera. 6. Præsumptio est potentior et firmior quæ est negativa, illâ quæ est affirmativa. 7. Præsumptio illa judicatur potentior et firmior quæ est fundata in ratione naturali, illâ quæ est fundata in ratione civili. 8. Firmior et validior existimatur illa præsumptio, quâ absurda et inæqualia evitantur. 9. Præsumptio quæ ducitur à facto, est firmior et potentior eâ quæ sumitur à non facto. 10. Præsumptio quæ favet animæ, sicque saluti æternæ, potentior et firmior est illâ quâ dicimus delictum non præsumi."

(*e*) Menochius de Præsumptionibus, lib. 1, quæst. 29, nn. 7 & 8; *Id.* de Arbitrariis Judicum, lib. 2, casus 472, n. 14 *et seq.*; Huberus, Præl. Juris Civilis, lib. 22, tit. 3, n. 37; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, n. 24; Mascard. de Prob. Concl. 1231, nn. 6 & 7; 2 Ev. Poth. 332.

(*f*) Dig. lib. 50, tit. 17, l. 80. See also Sext. Decretal. lib. 5, tit. 12, de Reg. Juris, Reg. 34.

they will naturally be affected by that which comes nearest to it; namely, specific proximate facts or circumstances, which give rise to special inferences, negativing the applicability of the general presumption to the particular case. Thus, although the owner in fee of land is presumed to be entitled to the minerals found under it (*g*), this presumption may be rebutted by that arising from non-enjoyment by him, and the use of those minerals by others (*h*). So, although the possession of land and the perception of rent is primâ facie evidence of a seisin in fee, still, where the demandant in a writ of right claimed under a remote ancestor, it was held that the presumption was successfully encountered by proof, that the demandant and his father, through whom his title was traced, had for a long time allowed other parties to keep possession of the land, when they themselves lived in the neighbourhood, and must have been aware of it (*i*). The flowing of the tide in a river is presumptive evidence of its being navigable (*j*); but the presumption may be rebutted by proof of the narrowness of the stream, or the shallowness of its channel, or of acts of ownership by private individuals, inconsistent with a right of public navigation (*k*). The presumption of innocence is a very general, and rather favoured presumption; but guilt, as we see every day, may be proved by presumptive evidence. Where the publication of a libel has been proved, malice will be presumed (*l*); as it will also on a charge of murder, from the fact of slaying (*m*). So, if a libel be sold by a servant in the discharge of his ordinary duty, this is presumptive, and — at least since the 6 & 7 Vict. c. 96, s. 7 — only presumptive evidence of publication by the master (*n*). So it is said to have been a rule in the ecclesiastical courts that where the existence of an adulterous intercourse had been proved, its continuance would be presumed so long as the parties lived under the same roof (*o*). So, although a fine, without any deed executed to declare the uses, was presumed to have been levied to secure the title of the conusor, evidence was receivable to rebut this presumption, and to show that it was levied to vest the land in the conusee (*p*). But it is not every circumstance or special inference that will suffice to set aside a general presumption, either of law or fact.

(*g*) *Rowbotham* v. *Wilson*, 8 H. L. C. 348.

(*h*) *Rowe* v. *Brenton*, 8 B. & C. 737; *Rowe* v. *Grenfel*, R. & M. 396.

(*i*) *Jayne* v. *Price*, 5 Taunt. 326.

(*j*) *Miles* v. *Rose*, 5 Taunt. 705.

(*k*) *Id.*; *R.* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, Cowp. 86.

(*l*) *Haire* v. *Wilson*, 9 B. & C. 643.

(*m*) Foster's C. L. 255, 290; 1 Hale, P. C. 455; 1 East, P. C. 340.

(*n*) *R.* v. *Walter*, 3 Esp. 21; *R.* v. *Gutch*, 1 Mood. & M. 437.

(*o*) *Turton* v. *Turton*, 3 Hagg. N. C. 350.

(*p*) *Roe* v. *Popham*, 1 Dougl. 25; Peake's Ev. 119, 5th Ed.

§ 332. II. *Presumptions derived from the course of nature are stronger than casual presumptions* (*q*). This is a very important rule, derived from the constancy and uniformity observable in the works of Nature, which render it probable that human testimonies, or particular circumstances which point to a conclusion at variance with her laws, are, in the particular instance, fallacious. "Naturæ vis maxima" (*r*). Thus, on an indictment for stealing a log of timber, it would probably be considered a sufficient answer to any chain of presumptive evidence, or even to the positive testimony of an alleged eye-witness, to show that the log in question was so large and heavy that ten of the strongest men could not move it (*s*). A charge of robbery brought by a strong person against a girl or a child, or of rape brought by an athletic female against an old or sickly man, would be refuted in this way. So, although this likewise rests in some degree on principles of public policy (*t*), sanity is always presumed, even when the accused is on his trial on a capital charge (*u*). Under this head come also those instances in which presumptions drawn from the natural feelings of the human heart have been found to prevail over others, and, among the rest, over that arising from possession, as in the judgment of Solomon, already mentioned (*v*). So, where a parent advances money to a child, it is presumed to be by way of gift and not by way of loan (*x*); and the harsh doctrine of collateral warranty rested, in some degree, on a strained application of this principle (*y*).

§ 333. III. *Presumptions are favoured which give validity to acts* (*z*). The maxim, "Omnia præsumuntur ritè esse acta," will be considered in its place (*a*); and it will only be necessary at present to advert to some cases in which this presumption has been held to override others also of a favoured kind, as, for instance, that of innocence. On an indictment for the murder of a constable, the fact of the deceased having publicly acted as constable, is sufficient primâ facie proof of his having been such, without producing his

(*q*) Menoch. de Præs. lib. 1, quæst. 29, n. 9; *Id.* de Arbitrariis Judicum, lib. 2, casus 472, n. 19; Mascard. de Prob. quæst. 10, n. 18; and Concl. 1231, nn. 17 & 18; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, n. 24.

(*r*) 2 Inst. 564; Plowd. 309.

(*s*) Menoch. de Arbitrariis Jud. lib. 2, casus 472, n. 21.

(*t*) *Infrà*, sect. 3, sub-sect. 1.

(*u*) Answer of the Judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 131; *R.* v. *Stokes*, 3 Car. & K. 185.

(*v*) 1 Kings, iii. 16; *suprà*, sub-sect. 2.

(*x*) Dig. lib. 10, tit. 2, l. 50; Voet. ad Pand. lib. 22, tit. 3, n. 15, *vers. fin.*; per Bayley, J., in *Hick* v. *Keats*, 4 B. & C. 69. 71.

(*y*) Co. Litt. 373 a.

(*z*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17; *Id.* Positiones Juris sec. Pand. lib 22, tit. 3, n. 24; Menoch. de Præs. lib. 1, quæst. 29, n. 3; *Id.* de Arbitrar. Jud. lib. 2, cas. 472, n. 2; Mascard. de Prob. Concl. 1231, nn. 20 & 23.

(*a*) *Infrà*, sect. 2, sub-sect. 4.

appointment (*b*). And on an indictment for perjury, in taking a false oath before a surrogate, it is sufficient, primâ facie, to prove that the party administering the oath acted as surrogate (*c*).

§ 334. IV. *The presumption of innocence is favoured in law* (*d*). This is a well-known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings. In *R.* v. *The Inhabitants of Twyning* (*e*), which is one of the leading authorities on the subject of conflicting presumptions, it appeared by a case sent up from the sessions, that about seven years before that time, a female pauper intermarried with Richard Winter, with whom she lived a few months, when he enlisted as a soldier, went abroad on foreign service, and was never afterwards heard of. In little more than twelve months after his departure she married Francis Burns. On this evidence the Court of Queen's Bench, consisting of Bayley and Best, JJ., held that the issue of the second marriage ought to be presumed legitimate; and the former judge said (*f*): "This is a case of conflicting presumptions, and the question is, which is to prevail. The law presumes the continuation of life; but it also presumes against the commission of crimes, and that even in civil cases until the contrary be proved. . . . The facts of this are, that there is a marriage of the pauper with Francis Burns, which is primâ facie valid; but the year before that took place, she was the wife of Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is that another person has committed a criminal act. I think, therefore, that the sessions decided right, in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time." This language goes much farther than was necessary for the decision of the actual case before the court; and it certainly cannot be supported to its full extent, as appears from the subsequent case of *R.* v. *The Inhabitants of Harborne* (*g*). There, in order to support

(*b*) *R.* v. *Gordon*, 1 Leach, C. L. 515.

(*c*) *R.* v. *Verelst*, 3 Camp. 432.

(*d*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17; *Id.* Positiones Juris sec. Pand. lib. 22, tit. 3, n. 24; Menoch. de Præs. lib. 1, quæst. 29, n. 11; *Id.* de Arbitr. Jud. lib. 2, cas. 472, n. 25; Mascard. de Prob. Concl. 1231, nn. 9, 30, &c.; *Middleton* v. *Barned*, 4 Exch. 241. In the U. S. A. the presumption of innocence overrides all other presumptions. Morgan's Best, p. 602, citing *West* v. *State*, 1 Wis., and other cases.

(*e*) 2 B. & Ald. 386.

(*f*) *Id.* 388.

(*g*) 2 A. & E. 540.

an order for the removal of a female pauper, of the name of Ann Smith, it was proved that on the 11th April, 1831, she had been married to one Henry Smith, who had since deserted her; in answer to which it was shown that he had been previously married, in October, 1821, to another female, with whom he lived until 1825, when he left her; that several letters had since been received from her in Van Diemen's Land, one of which was produced, bearing date twenty-five days previous to the second marriage. The sessions, on this evidence, presumed the first wife to be living at the time of the second marriage, and quashed the order. On the case coming on for argument before the Court of Queen's Bench, several cases were cited, and *R.* v. *Twyning* was relied on as an authority, to show that the party asserting the life of the first wife, and thereby the criminality of the husband, was bound to show the continuance of the life up to the very moment of the second marriage; and that the court was precluded from inferring the continuance of the life until the marriage, by the strict rule of legal presumption laid down in that case. The court, however (Lord Denman, C. J., and Littledale and Williams, JJ.), held that the conclusion drawn by the sessions from the evidence was proper. Lord Denman, in the course of his judgment, expressed himself as follows: "The only circumstance raising any doubt in my mind is the doctrine laid down by Bayley, J., in *R.* v. *Twyning*. But in that case the sessions found that the plaintiff was dead; and this court merely decided that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds; the principle, however, on which they seem to have proceeded was not necessary to that decision. I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, — such, for instance, as the age or health of the party. There can be no such strict presumption of law. . . . I am aware that Bayley, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence cannot shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Judgments to a similar effect were given by the other members of the court. There is no conflict whatever between the *decisions* in the cases of

R. v. *The Inhabitants of Twyning*, and *R.* v. *The Inhabitants of Harborne*, nor does the principle involved in either of them present any real difficulty. The presumption of innocence is a præsumptio juris, and, as such, is good until disproved. *R.* v. *Twyning* decides that the presumption of the fact of the continuance of life, derived from the first husband's having been shown to be alive about a year previous to the second marriage, ought not to outweigh the former presumption in the estimation of the sessions or a jury; while *R.* v. *Harborne* determines, that if the period be reduced from twelve months to twenty-five days it would be otherwise; and that the sessions or a jury might, in their discretion, presume the first husband to be still living. This view of these cases is confirmed by the judgment of the House of Lords, in the subsequent case of *Lapsley* v. *Grierson* (*h*). Another curious case is *Reg.* v. *Willshire* (*i*). In that case Willshire, who was indicted in 1881 for bigamy in 1880, had married in 1864. In 1868 he had been convicted of bigamy in marrying in 1868, while his wife was alive. In 1879 he had married again, and in 1880 yet again, while the woman to whom he was married in 1879 was alive. Thus, there arose a presumption in favour of the marriage of 1879 being innocently contracted, and therefore valid. But the prisoner, by putting in the conviction for bigamy in 1868, showed that there was a valid marriage in 1864 with a woman who survived at least till 1868. Thus there arose a presumption of the continuance of a life, — of the life of the woman he originally married in 1864. It was held to be a question of fact for the jury whether the wife of 1864 was alive or not when the prisoner married in 1879, and the conviction was quashed on the ground that the question had not been left to them. In connection with this case it should be observed: 1. The prisoner, if the case had been tried with the proper direction to the jury, would have owed his acquittal, if he had been acquitted, to the jury believing him to be guilty of a crime for which he was not indicted. 2. The strictness of criminal pleading prevented an indictment in the alternative. 3. The strictness of criminal procedure prevented a new trial with a proper direction to the jury. 4. Although the prisoner could set up the presumption of the continuance of his wife's life in answer to indictments for ever so many marriages during the lifetime of any woman married to him after her, he yet could avail himself of her seven years' absence as a defence to an indictment for marrying again during *her* lifetime.

(*h*) 1 Ho. Lo. Cas. 498.

(*i*) 6 Q. B. D. 366, C. C. R.

Section II.

PRESUMPTIONS OF LAW AND FACT USUALLY MET IN PRACTICE.

§ 335. It is proposed in this section to consider the principal presumptions of law and fact usually met with in practice, which will be treated in the following order: —

1. Presumption against ignorance of the law.
2. Presumptions derived from the course of nature.
3. Presumptions against misconduct.
4. Presumptions in favour of the validity of acts.
5. Presumptions from possession and user.
6. Presumptions from the ordinary conduct of mankind, the habits of society, and the usages of trade.
7. Presumption of the continuance of things in the state in which they have once existed.
8. Presumptions in disfavour of a spoliator.
9. Presumptions in international law.
10. Presumptions in maritime law.
11. Miscellaneous presumptions.

Sub-Section I.

PRESUMPTION AGAINST IGNORANCE OF THE LAW.

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§ 336. The law presumes *conclusively* against ignorance of its provisions.[1] It is a *præsumptio juris et de jure* that all persons (even foreigners) (*k*) subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must, for the reasons stated in the Introduction to this work (*l*), be supposed to be acquainted with its provisions so far as to render them amenable to punishment for their violation, and to have done

(*k*) *R.* v. *Esop*, 7 C. & P. 456.

(*l*) Pt. 2, § 45.

[1] See § 296, n. 1, B. VII. (*b*), *supra*, at p. 310.

all acts with a knowledge of their legal effects and consequences (*m*), — "Ignorantia juris, quod quisque tenetur scire, non excusat" (*n*). It is on this principle that money paid under a mistake of law cannot be recovered (*o*); whereas money paid under a mistake of fact can (*p*).[1]

Acts of Parliament take effect on the day on which they receive the royal assent, unless, as frequently happens, the Act itself provides otherwise (*q*), in which case they take effect on the day so provided. In early times, they were frequently promulgated by proclamation; in modern times, they have been always printed by the government printer. But there is no legal duty on any person to procure them to be printed, nor is a government printer's copy evidence of the contents of a public act, though it is of a local one (*r*). The only evidence of the contents of a public act is the Parliament roll; and the communication of the royal assent to Parliament is sufficient promulgation to make it legally binding, without any further publication.

Very many public bodies have, by charter or statute, power to make by-laws, rules, regulations, or orders. For these to take effect, the mere resolution of the body making them is not sufficient. There must be some publication to the outside world (*s*), and the mode of publication is frequently, but by no means universally, prescribed by the charter or statute from which the power to make the by-law, &c., is derived. If this mode of publication be followed, the by-law, &c., would seem to be binding (*t*), whether it is in fact known of or not.[2] If this mode of publication be disregarded, the by-law, &c., would seem not to be binding, although it be in fact known of. If no mode of publication be prescribed, it is difficult to say what mode will make the by-law binding. Blackstone says, speaking of the promulgation of laws generally, "Whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people." It is submitted that whether the

(*m*) Doct. & Stud. Dial. 1, c. 26; Dial. 2, cc. 16, 46; Plowd. 342–343; 1 Co. 177 b; 2 Co. 3 b; 6 Co. 54 a.

(*n*) 4 Blackst. Comm. 27.

(*o*) *Bilbie* v. *Lumley*, 2 East, 469.

(*p*) *Milnes* v. *Duncan*, 6 B. & C. 671.

(*q*) 33 Geo. 3, c. 13. Before this Act, by an absurd and unjust fiction, statutes "related back" to the first day of the session on which they were passed. *Latless* v. *Holmes*, 4 T. R. 660.

(*r*) 8 & 9 Vict. c. 113, s. 3.

(*s*) See Lumley on By-laws, where a very full list of statutes authorising by-laws is given.

(*t*) See *Motteram, app., Eastern Counties Rail. Co., resps.*, 7 C. B. N. S. 58, in which the court, diss. Williams, J., took a liberal view of the statute (8 Vict. c. 20) prescribing public action.

[1] See also for American cases, Hart *v.* Roper, 6 Ired. Eq. 349; Butler *v.* Livingston, 15 Ga. 565.

[2] For an American case, see Boyers *v.* Pratt, 1 Humph. 90.

promulgation was sufficient to bind is a question of law, not of fact, and that the question whether a particular individual, proceeded against under the by-law, had notice, in fact, of it, ought not to be considered; but the point is bare of authority, and very difficult.

The fact of the adoption of Adoptive Acts, or acts which apply only in particular localities if and so far as they have been adopted by the inhabitants or local authorities, must necessarily require some kind of publication. The Select Vestries Act of 1831, 182 W. 4, c. 60, which is believed to have been the earliest of the Adoptive Acts, requires by its 8th section notice of the fact of adoption to be published in the London "Gazette" and in one or more of the local newspapers, besides being affixed on the church doors. Two modern Adoptive Public Health Acts — the Infectious Diseases Prevention Act, 1890, and the Public Health Acts Amendment Act, 1890 — require similar newspaper notices (except that in the "Gazette") and similar church-door publication, and also provide that no objection to the effect of the adopting resolution, on the ground that the resolution was not sufficiently published, shall be made after three months from the date of the first publication.

§ 337. Courts of justice are also presumed to know the law, but in a different sense.[1] Private individuals are only taken to know it sufficiently for their personal guidance; but tribunals are to be deemed acquainted with it, so as to be able to administer justice when called on (*u*); for which reason it is not necessary, in pleading, to state matter of law (*x*).

The sovereign is also presumed to be acquainted with the law, — "Præsumitur rex habere omnia jura in scrinio pectoris sui" (*y*); still it is competent, in certain cases, to show that grants from the crown have been made under a mistake of the law (*z*).

(*u*) See the judgment of Maule, J., in *Martindale* v. *Faulkner*, 2 C. B. 719–720; and the argument of the Att.-Gen. in *Stockdale* v. *Hansard*, 9 A. & E. 1, 131.

(*x*) Steph. Plead. 383, 5th Ed.; 1 Chit. Plead. 216, 6th Ed.

(*y*) Co. Litt. 99 a.

(*z*) Plowd. 502; 2 Blackst. Comm. 348; *R.* v. *Clarke*, 1 Freem. 172. See *Legat's case*, 10 Co. 109.

[1] See § 253, n. 1, *supra*, at p. 253.

Sub-Section II.

PRESUMPTIONS DERIVED FROM THE COURSE OF NATURE.

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§ 338. Presumptions derived from the course of nature have been already noticed as in general entitled to more weight than such presumptions as arise casually (*a*), — "Naturæ vis maxima" (*b*), — and they may be divided into physical and moral. As instances of the first, the law notices the course of the heavenly bodies, the changes of the seasons, and other physical phenomena, according to the maxim, "Lex spectat naturæ ordinem" (*y*). "If," says Littleton (*z*), "the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist, if such tenant dieth in winter, then the lord cannot distrain for his relief, until the time that roses by the course of the year may have their growth." So the law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages (*a*), &c.; for which reason, idiocy, lunacy, &c., are never presumed. And the usual incapacities of infancy are not overlooked. It is a *præsumptio juris et de jure* that children under the age of seven years are incapable of committing felony (*b*); that males under fourteen are incapable of sexual

(*a*) *Suprà*, sect. 1, sub-sect. 3, § 334.

(*b*) 2 Inst. 564; Plowd. 309.

(*y*) Co. Litt. 92 a, 197 b.

(*z*) Sect. 129.

(*a*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17. In the case of gifts in tail, the tenant is presumed never too old to be capable of having issue to inherit by force of the gift. Ph. & Am. Ev. 462. See also *Reynolds* v. *Reynolds*, 1 Dick. 374, and *Leng* v. *Hodges*, 1 Jac. 585. Several instances are given in Beck's Med. Jurisp. 148, 7th Ed., of females having borne children above the ages of fifty, and even sixty, years; and see the celebrated *Douglas cause*, given by him at page 402. In *Croxton* v. *May*, 9 Ch. D. 380, the Court of Appeal refused to treat as past child-bearing a woman aged fifty-four and a half years, who had never had any children, *but had been married only three years*. In the case of single women, or women long married without having children, the limit seems to be from fifty-three to fifty-five years. See *Id.*, *Haynes* v. *Haynes*, 35 L. J. Ch. 303.

(*b*) 1 Hale, P. C. 27; 4 Blackst. Comm. 23.

intercourse (*c*); and that males under fourteen years, and females under twelve, cannot consent to marriage (*d*).[1] So, between the ages of seven and fourteen, an infant is presumed incapable of committing felony; but this is only *præsumptio juris;* and a malicious discretion in the accused may be proved, in which case it is said, "malitia supplet ætatem" (*e*).

§ 339. Under this head come the important and difficult questions of the maximum and minimum term of gestation of the human fœtus, — questions replete with importance and delicacy, and an erroneous decision on which may not only compromise the rights of individuals, but destroy female honour, and jeopardise the peace of families. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight. As to the *maximum* term of gestation, — according to Sir Edward Coke, the "legitimum tempus appointed by law *at the furthest* is nine months or forty weeks;" for which he cites an old case of Robert Radwell, in the reign of Edward I. (*f*), and endeavours to fortify his position by a passage from the Book of Esdras (*g*). But this doctrine is not clear even upon the ancient authorities (*h*); while it is denied by the modern (*i*), and is contrary to experience. According to many eminent authorities, the usual period of gestation is nine *calendar* months (*k*); but others fix it at ten *lunar* months, being 280 days, or nine *calendar* months and *about* a week over (*l*). Another says that "according to the testimony of experienced accoucheurs, the average duration of gestation in the human female is comprised between the thirty-eight and fortieth weeks after conception" (*m*). It is, however, conceded on all hands that a delay or difference in the time may take place, of a few days, or perhaps even weeks; as there are numerous causes, both physical and moral, by which delivery may be accelerated or retarded. But whether the laws of nature admit of such a phenomenon as the protraction of the term of gestation for a considerable number of weeks or months beyond the

(*c*) 1 Hale, P. C. 630; *R.* v. *Phillips*, 8 C. & P. 736; *R.* v. *Brimilow*, 9 *Id.* 336.

(*d*) 1 Blackst. Comm. 436.

(*e*) 1 Hale, P. C. 26; 4 Blackst. Comm. 23.

(*f*) Co. Litt. 123 b.

(*g*) 2 Esdras, iv. 40, 41.

(*h*) See them collected and ably commented on by Mr. Hargrave, in his edition of Co. Litt. 123 b, n. (2).

(*i*) Runnington on Ejectment, 383 *et seq.*

(*k*) Harg. Co. Litt. 123 b, n. (2); Chitty's Med. Jurisp. 405.

(*l*) Beck's Med. Jurisp. 356, 7th Ed. Nine *calendar* months may be from 273 days to 275 days, but ten *lunar* months are 280 days.

(*m*) Tayl. Med. Jurisp. 606–607, 7th Ed.

[1] See § 43, n. 1 (*f*), *supra*, at p. 58.

accustomed period, is an unsettled point (*n*). It is incontestable that there are to be found on record a great many cases, true or false, of gestation protracted considerably beyond the usual time. There are old instances of children declared legitimate by foreign tribunals, after a gestation, real or alleged, of ten, eleven, twelve, thirteen, and fourteen months, and even longer (*o*). Upon the whole, we may fairly conclude that, admitting the possibility of gestation being protracted in the sense in which the word is here used, the *genuine* cases of it are rare (*p*). It is, perhaps, hardly necessary to observe that, in all investigations of this nature, the character and conduct of the mother are elements of the highest importance to be taken into consideration; as also are the characters of the deposing witnesses, and the motives to falsehood or fabrication which may exist on either side.

§ 340. With respect to the *minimum* term of gestation, it seems now conceded that, as a general rule, no infant can be born capable of living until 150 days, or five months, after conception (*q*). There are, it is true, some old cases recorded to the contrary (*r*), but they have been doubted (*s*). It seems also conceded that children born before seven months are very unlikely to live, and that even at seven months the chance is against the child (*t*).

§ 341. We now proceed to the consideration of presumptions of this kind, derived from observation of the *moral* world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon (*u*). On this principle, it is held that natural love and affection form a *good* consideration, sufficient to support all instruments where a *valuable* consideration is not expressly required by law (*x*); that money advanced by a parent to his child is intended as a gift, not as a loan (*y*), &c. And it

(*n*) Beck's Med. Jurisp. ch. 9, 7th Ed.; Chitty, Med. Jurisp. 405, 406; Tayl. Med. Jurisp. 525, c. 54, 7th Ed.

(*o*) See a large number collected in Beck's Med. Jurisp. 362–376, 7th Ed., as well as in other authors who have written on the subject.

(*p*) It is difficult to withhold assent from the following observations of a French writer: "If we admit all the facts reported by ancient and modern authors, of delivery from eleven to twenty-three months, it will be very commodious for females; and if so great a latitude is allowed for the production of posthumous heirs, the collateral ones may in all cases abandon their hopes, unless sterility be actually present. (Louis, Mémoire contre Légitimité des Naissances prétendues tardives, as cited in Beck's Med. Jurisp. 366, 7th Ed.)

(*q*) Beck's Med. Jurisp. 210, 7th Ed.

(*r*) *Id.*, and Chitty's Med. Jurisp. 406.

(*s*) Beck, Med. Jurisp. 210, 7th Ed.

(*t*) *Id.*, 212; Tayl. Med. Jurisp. 615 *et seq.*, 7th Ed.

(*u*) 1 Kings, iii. 16.

(*x*) 2 Blackst. Comm. 297; Dy. 374, pl. 17; Plowd. 306, 309; Finch, Law, 25.

(*y*) *Hick* v. *Keats*, 4 B. & C. 69, 71, per Bayley, J. "Quæ pater filio emancipate

is a maxim of law, "Nemo præsumitur alienam posteritatem suæ prætulisse" (*z*).

§ 342. The civil law laid down as a maxim, "Qui solvit, nunquam ita resupinus est, ut facile suas pecunias jactet, et indebitas effundat" (*a*); and in the common law, the fact of transferring money to another person is presumptive evidence of payment of an antecedent debt, and not of a gift or loan (*b*). "Non præsumitur donatio" (*c*).

§ 343. It was said by Abbott, C. J., in *Townson* v. *Tickell* (*d*), that, "primâ facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given;" and presumptions are sometimes founded on the assumption that a person must be taken to be willing to receive a benefit (*e*). Thus, in *Thompson* v. *Leach* (*f*), it was held that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee, whose consent to the act is implied; for, says the book, "a gift imports a benefit, and an assumpsit to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement as why a grant of goods should vest a property, or sealing of a bond to another in his absence should be the obligee's bond immediately, without notice." In *Smyth* v. *Wheeler* (*g*), where a lease was assigned to B. and C. on certain trusts, Hale, C. J., said, "This assignment, being of a chattel, is in both the assignees till the disagreement of B., and then is wholly in C." So it is said that mutual benefit is evidence of an agreement; as where two men front a river, and each of them has land between him and the river, and they cut through each other's ground for water, and that continues twenty years, in such a case an agreement may be presumed (*h*).

§ 344. It is also a maxim running through the whole law, that every person must be taken to intend the natural consequences of his acts (*i*). Thus inasmuch as the effect of a conveyance of property by

studiorum causâ peregre agenti subministravit, si non credendi animo pater misisse fuerit comprobatus, sed pietate debitâ ductus, in rationem portionis, quæ ex defuncti bonis, ad eundem filium pertinuit, computare æquitas non patitur." Dig. lib. 10, tit. 2, l. 50. See also Mascard. de Prob. Concl. 76.

(*z*) Co. Litt. 373 a; Wing. Max. 285.

(*a*) Dig. lib. 22, tit. 3, l. 25. See also Voet. ad Pand. lib. 22, tit. 3, n. 15.

(*b*) *Welch* v. *Seaborn*, 1 Stark. 474; *Cary* v. *Gerish*, 4 Esp. 9; *Aubert* v. *Walsh*, 4 Taunt. 293; *Breton* v. *Cope*, 1 Peake, 31.

(*c*) Matth. de Prob. cap. 2, n. 10.

(*d*) 3 B. & A. 31, 36.

(*e*) *Thompson* v. *Leach*, 2 Salk. 618; also reported 3 Lev. 284; 2 Ventr. 198; *Thomas* v. *Cook*, 2 B. & Ald. 119, 121. See Burton, Real Prop. 67, 8th Ed.

(*f*) 2 Salk. 618; also reported 3 Lev. 284; 2 Ventr. 198.

(*g*) 2 Keb. 774.

(*h*) Vin. Abr. Ev. Q. A. pl. 8.

(*i*) 2 Stark. Ev. 572, 3rd Ed.; 1 Greenl. Ev. § 18, 7th Ed.

way of fraudulent preference must be to delay or defeat creditors, the law will presume that such conveyance was made with that intention (*k*). But the principal applications of this maxim are to be found in criminal cases, as will be shown in a subsequent part of this chapter (*l*).

Sub-Section III.

PRESUMPTIONS AGAINST MISCONDUCT.

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§ 345. We next proceed to consider the presumptions which the law makes against misconduct.

§ 346. First, then, it is a præsumptio juris, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, — whether malum in se or malum prohibitum (*m*), — or to have done any act subjecting him to any species of punishment, such, for instance, as a contempt of court (*n*); or involving a penalty, such as loss of dower (*o*), &c. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence, or of dealing with the supposed conduct; but it holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally (*p*). It is therefore a settled rule in criminal cases that the accused must be presumed to be innocent until proved to be guilty; and consequently that the onus of proving everything essential to the establishment

(*k*) Per Lord Cairns, C., *Ex parte Villars*, L. Rep., 9 Ch. Ap. 432, 443.

(*l*) *Infrâ*, sect. 3, sub-sect. 1

(*m*) Ph. & Am. Ev. 464; 2 Ev. Poth. 332.

(*n*) *Scholes* v. *Hilton* 10 M. & W. 15, 17.

(*o*) *Sidney* v. *Sidney*, 3 P. Wms. 276; *Watkins* v. *Watkins*, 2 Atk. 96.

(*p*) *Williams* v. *The East India Company*, 3 East, 192; *R.* v. *The Inhabitants of Twyning*, 2 B. & A. 386; *R.* v. *The Inhabitants of Harborne*, 2 A. & E. 540; *Lapsley* v. *Grierson*, 1 Ho. Lo. Cas. 498; *Ross* v. *Hunter*, 4 T. R. 33, 38; 2 R. R. 319, 322, per Buller, J.; *Leete* v. *The Gresham Life Insurance Society*, 15 Jur. 1161, 1162, per Platt, B.

of the charge against him, lies on the prosecutor, — a maxim founded on the most obvious principles of justice and policy (*q*). It is, however, in general sufficient to prove a primâ facie case; for, as has been well remarked, "imperfect proofs, from which the accused might clear himself, and does not, become perfect" (*r*). "In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction" (*s*). Undoubtedly, the more serious or improbable the charge, the stronger must be the primâ facie proof; and additional caution is required when the offence is of very ancient date, for in such cases the means of defence, particularly by proof of an alibi, — when true, the most complete of all answers, — are greatly diminished (*t*). Although in point of law "Nullum tempus occurrit regi," yet as matter of practice, "Accusator post rationabile tempus non est audiendus, nisi bene de se omissionem excusaverit" (*u*). But the presumption in favour of innocence will not be made, when a stronger presumption is raised against it by evidence or otherwise (*x*).

§ 347. It is a branch of this rule that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning (*y*). Thus, where a deed or other instrument is susceptible of two constructions, one of which the law would carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. "In facto quod se habet ad bonum et malum, magis de bono, quàm de malo, lex intendit" (*z*). Thus, where tenant in tail makes a lease for life, without saying for whose life, it shall be under-

(*q*) Introd. pt. 2, § 49. It is related that on one occasion, when the Emperor Julian was sitting to administer justice, a prosecutor, seeing his cause about to fail for want of proof, exclaimed, "Ecquis, florentissime Cæsar, nocens esse poterit usquam, si negare suffecerit?" To which the emperor readily rejoined, "Ecquis innocens esse poterit, si accusasse suffecerit." Ammianus Marcellinus, lib. 18, c. 1.

(*r*) Beccaria, Dei Delitti et Delle Pene, § 7.

(*s*) Per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 95, 161–162. See also per Lord Mansfield, in *Blatch* v. *Archer*, Cowp. 63, 65.

(*t*) Wills, Circ. Ev. 148, 3rd Ed. There are several instances of successful prosecution after the lapse of very long time from the commission of the offence. See, in particular, the case of W. A. Horne, who was tried and executed in 1759 for the murder of his child in 1724 (2 Annual Reg. 368); also that of Joseph Wall, Governor of Goree, who was executed in 1802 for a murder committed in 1782 (28 How. St. Tr. 51). In the celebrated case of Eugene Aram, also, there was an interval of about fourteen years between the murder and the trial. (2 Annual Reg. 351.)

(*u*) Moore, 817.

(*x*) See *suprà*, sect. 1, sub sect. 3.

(*y*) Co. Litt. 42 a & b; Finch, Law, 57.

(*z*) Co. Litt. 78 b.

stood that he meant his own, as that is an estate he may lawfully create; whereas if he meant it for the life of any one else, he would exceed his power, and, previous to the 3 & 4 Will. 4, c. 27, s. 39, would have worked a discontinuance (*a*). So where A., who had commenced an action against B. to recover a sum of money, agreed with C. to suspend the proceedings, on payment of a specified sum and the delivery of several promissory notes, C. undertaking, — in the event of any of the notes being dishonoured, and A. issuing a capias or detainer against B., — either to surrender him to custody, or pay the money due on the notes; it was held that the contract was legal, and must be understood to mean that C. was to procure the surrender of B. by *lawful* means, as by his consent, and not by any attempt to take him forcibly into custody (*b*).

§ 348. 2. All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law. Thus, the judgment of courts of competent jurisdiction are presumed to be well founded (*c*),[1] and their records to be correctly made (*d*); judges and jurors are presumed to do nothing causelessly or maliciously (*e*), — "De fide judicis non recipitur quæstio" (*f*); "Quæ in curiâ regis acta sunt, ritè agi præsumuntur" (*g*); public officers are presumed to do their duty (*h*);[2] a parson is presumed to be always resident on his benefice (*i*); a beneficed clergyman is presumed to have read the articles of the Church (*k*), and to have made the declaration required by 13 & 14 Car. 2, c. 4, relative to the uniformity of public prayers (*l*), &c. So oral evidence is not receivable of what the accused or the witnesses said when before the committing magistrate, unless there be positive proof that what they did say was not taken down in writing (*m*); for the presumption of law is, that the directions of the statutes in that behalf were obeyed (*n*).

(*a*) Co. Litt. 42 a.

(*b*) *Lewis* v. *Davison*, 4 M. & W. 654.

(*c*) "Res judicata pro veritate accipitur." Co. Litt. 103 a; Dig. lib. 50, tit. 17, l. 207; Introd. pt. 2, § 44.

(*d*) 1 Stark. Ev. 252, 3rd Ev.; *Read* v. *Jackson*, 1 East, 355; *Earl of Carnarvon* v. *Villebois*, 13 M. & W. 313.

(*e*) Anders. 47, pl. 34; *Sutton* v. *Johnstone*, 1 T. R. 493, 503; *Fray* v. *Blackburn*, 3 B. & S. 576, 578, n., and the authorities there referred to.

(*f*) Bac. Max. Reg. 17.

(*g*) 3 Bulst. 43.

(*h*) 3 Stark. Ev. 936, 3rd Ed.; *Simms* v. *Henderson*, 11 Q. B. 1015.

(*i*) Co. Litt. 78 b.

(*k*) *Monke* v. *Butler*, 1 Rol. 83.

(*l*) *Powell* v. *Milbanke*, 3 Wils. 355.

(*m*) 2 Ev. Poth. 335–336; *Phillips* v. *Wimburn*, 4 Car. & P. 273; *Parsons* v. *Brown*, 3 Car. & K. 295–296.

(*n*) See those statutes, *suprà*, bk. 1, pt. 1, § 105.

[1] See § 43, n. 1 (*c*), *supra*, at p. 58.

[2] American decisions are in accord. Phila. R. R. *v.* Stimpson, 14 Pet. 448; State *v.* Howard, 10 Ia. 101; Minter *v.* Crommelin, 18 How. 87; Ward *v.* Barrows, 2 Oh. St. 241; Succession of Lauve, 6 La. An. 530. See also Jones *v.* Muisbach, 26 Tex. 235.

§ 349. 3. It is a principle of law nearly, if not altogether, as universal as the former, that "Odiosa et inhonesta non sunt in lege præsumenda" (*o*).[1] In furtherance of this it is a maxim that fraud and covin are never presumed (*p*), even in third parties whose conduct only comes in question collaterally (*q*). So the law presumes against vice and immorality, and on this ground presumes strongly in favour of marriage (*r*); so that cohabitation and reputation are held to be presumptive evidence of marriage (*s*), in all cases except in prosecutions for bigamy, and in cases where damages are claimed for adultery under the 20 & 21 Vict. c. 85, s. 33, in each of which proceedings an actual marriage must be proved (*t*). The former of these exceptions seems to rest on the ground that the accused has the presumption of innocence in his favour; and the latter, partly on the ground that the proceeding is in the nature of a penal one; but chiefly because it might otherwise be turned to a bad purpose by persons giving the name and character of wife to women to whom they had not been married.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy) is the presumption in favour of the legitimacy of children, — "Semper præsumitur pro legitimatione puerorum, et filiatio non potest probari" (*u*). Thus it is a præsumptio juris et de jure that a child born after wedlock, of which the mother was even visibly pregnant at the time of marriage, is the offspring of the husband (*x*). So every child born during wedlock, where the married parties are neither infrà nubiles annos, nor physically disqualified for sexual intercourse, is presumed legitimate (*y*) according to the maxim, "Pater est quem nuptiæ demonstrant," — a presumption which holds even when the parties are living apart by mutual consent; but not when they are separated by a sentence pronounced by a court of competent jurisdiction, in which case obedience to the sentence of the court will be

(*o*) 10 Co. 56 a.

(*p*) *Id.*; Cro. El. 292, pl. 2; Cro. Jac. 451; Cro. Car. 550; *Master* v. *Miller*, 4 T. R. 320, 333, per Buller, J.

(*q*) Per Buller, J., in *Ross* v. *Hunter*, 4 T. R. 33, 38.

(*r*) *Harrison* v. *The Burgesses of Southampton*, 4 De G., M. & G. 137; *Harrod* v. *Harrod*, 1 K. & J. 4.

(*s*) *Doe* d. *Fleming* v. *Fleming*, 4 Bing. 266; *Reed* v. *Passer*, 1 Peake, 233; *Sichel* v. *Lambert*, 15 C. B. N. S. 781, 787.

(*t*) *Morris* v. *Miller*, 4 Burr. 2057; *Birt* v. *Barlow*, 1 Dougl. 171; *Catherwood* v. *Caslon*, 13 M. & W. 261, 265. This last case is based on *R.* v. *Millis*, 10 Cl. & F. 534, as to which see the observations of Willes, J., in *R.* v. *Manwaring*, 1 Dearsl. & B. 132, 139; and also *Beamish* v. *Beamish*, 9 Ho. Lo. Cas. 274.

(*u*) 5 Co. 98 b. See also Co. Litt. 126 a.

(*x*) 1 Rob. Abr. Bastard, B.; Co. Litt. 244 a; 1 Phill. Ev. 473, n. 4, 10th Ed.

(*y*) 1 Rol. Abr. Bastard, B.

[1] So also of the American cases. Greenwood *v.* Lowe, 7 La. An. 197; Timson *v.* Moulton, 3 Cush. 269; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) Ch. 7, acc. See also, § 296, n. 1, B. V., *supra*.

presumed (*z*). In very ancient times this presumption of legitimacy was only præsumptio juris (*a*); but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife (*b*). In later times, however, this has been very properly relaxed; and it is now competent to negative the fact of sexual intercourse between the parties during the time when, according to the course of nature, the husband could have been the father of the child (*c*). But if the fact of sexual intercourse between the husband and wife within that time has been established to the satisfaction of the tribunal, the presumption cannot be rebutted by proof of adultery; as the law will not, in that case, allow a balance of evidence as to who was most likely to be the father of the child (*d*).

§ 350. 4. Wrongful or tortious conduct will not be presumed: "Injuria non præsumitur" (*e*); "Nullum iniquum est in jure præsumendum" (*f*). Thus, no species of ouster, such as disseisin, discontinuance, &c., will be presumed without proof, either direct or presumptive (*g*). So when a party to any forensic proceeding tenders, in support of his case, a document which must be taken, primâ facie, to be the property of another, the court will presume that he did not come by it in any tortious way (*h*). And where a person who is beyond the jurisdiction of a court has in his possession a document required by that court for the purposes of justice, it is not to be presumed that he will withhold it (*i*).

§ 351. 5. Want of religious belief, or irreligious conduct, will not be presumed. "All the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God" (*k*). "Nemo præsumitur esse immemor suæ æternæ salutis, et maximè in articulo mortis" (*l*); and partly on this principle, the declarations of a person who has met a violent end, made by him when under the conviction of his impending death, are, contrary to the general principle which

(*z*) *St. George's* v. *St. Margaret's*, 1 Salk. 123; *Sidney* v. *Sidney*, 3 P. Wms. 275.

(*a*) 1 Phill. Ev. 462, 10th Ed.

(*b*) Co. Litt. 244 a; *R.* v. *Alberton*, 1 L. Raym. 395–396; *R.* v. *Murrey*, 1 Salk. 122.

(*c*) *Morris* v. *Davies*, 5 Cl. & F. 163; *R.* v. *The Inhabitants of Mansfield*, 1 Q. B. 444. And see *Legge* v. *Edmunds*, 25 L. J. Ch. 125; *Plowes* v. *Bossey*, 31 *Id.* 681; *Atchley* v. *Sprigg*, 33 *Id.* 345.

(*d*) *Banbury Peerage case*, 1 Sim. & S. 155; *Head* v. *Head*, *Id.* 152; *Morris* v. *Davies*, 5 Cl. & F. 163; *Case of the Barony of Saye and Sele*, 1 Ho. Lo. Cas. 507; *Wright* v. *Holdgate*, 3 Car. & K. 158.

(*e*) Co. Litt. 232 b.

(*f*) 4 Co. 72 a.

(*g*) *Doe* d. *Fishar* v. *Prosser*, Cowp. 217. See Co. Litt. 42 a & b; *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568; *Thomas* v. *Thomas*, 2 Kay & J. 79.

(*h*) Littleton, sect. 375–377.

(*i*) *Boyle* v. *Wiseman*, 10 Exch. 647.

(*k*) 1 Greenl. Ev. § 42, 7th Ed.

(*l*) 6 Co. 76 a.

excludes hearsay testimony, receivable in evidence against a party charged with being the cause of the death (*n*).

§ 352. 6. All testimony given in a court of justice is presumed to be true until the contrary appears (*o*). "La ley ne veut que on donne faux evidence" (*p*). This presumption seems based on four grounds: 1. A reliance on the truth of human testimony in general (*q*); 2. That the law will not presume crime (*r*), *i. e.*, perjury; 3. That the law will not presume wrong; *i. e.*, an intention to injure the party whom the evidence affects; and 4. That the law will not presume irreligion (*s*), and consequently will not presume intentional false swearing.

Sub-Section IV.

SUMPTIONS IN FAVOUR OF THE VALIDITY OF ACTS.

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§ 353. The important maxims, "Omnia præsumuntur ritè esse acta" (*t*);[1] "Omnia præsumuntur solenniter esse acta" (*u*); "Omnia præsumuntur legitimè facta, donec probetur in contrarium," (*x*), &c., must not be understood as of universal application. The extent to which presumptions will be made in support of acts depends very much on whether they are favoured or not by law, and also on the nature of the fact required to be presumed. The true principle intended to be conveyed by the rule, "Omnia præsumuntur ritè esse acta," and

(*n*) *Suprà*, bk. 2, pt. 2, and *infrà*, ch. 4.
(*o*) Cro. Jac. 601, pl. 26.
(*p*) Per Grevil, M. 20 H. VII., 11 B. pl. 21.
(*q*) Introd. pt. 1, §§ 15 *et seq.*
(*r*) *Ante*, § 346.
(*s*) *Ante*, § 351.
(*t*) 2 Ev. Poth. 335; 1 Phill. Ev. 480, 10th Ed.; 3 B. & C. 327; 7 *Id.* 790; 18 C. B. 45; 6 E. & B. 973; 13 C. B. N. S. 639.
(*u*) 12 Co. 4 & 5.
(*x*) Co. Litt. 232 b; 8 Cl. & F. 144; 10 *Id.* 162.

[1] For the American law see State *v.* Glisson, 93 N. C. 506; Dove's case, 82 Va. 301; Kendrick *v.* Lapham, 25 Fla. 819; Trebbe *v.* Williams, 80 Ky. 661; State *v.* Kempf, 69 Wis. 470; Frierson *v.* Galbreath, 12 Lea, 129.

the other expressions just quoted, seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy.

§ 354. Taking a general view of the subject, the acts or things thus presumed are divisible into three classes: 1. Where from the existence of posterior acts in a supposed chain of events, the existence of *prior* acts in the chain is inferred or assumed, — priora præsumuntur à posterioribus (*y*), — as where a prescriptive right or a grant is inferred from modern enjoyment (*z*). 2. Where the existence of *posterior* acts is inferred from that of prior acts, — præsumuntur posteriora à prioribus (*y*), — as where the sealing and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing only (*a*). This is manifestly the reverse of the former, and, as a general rule, the presumption is much weaker (*b*). 3. Where *intermediate* proceedings are presumed, — "probatis extremis, præsumuntur media" (*c*), — as where livery of seisin is presumed, on proof of a feoffment and twenty years' enjoyment under it (*d*); or where a jury are directed to presume mesne assignments (*e*).

§ 355. The real nature and extent of this principle will be best understood by the examination of decided cases, in which it has been recognised and acted on by the courts, and of others where it has been held not to apply. With this view it is proposed to consider it with reference, first, to official appointments; secondly, to official acts; thirdly, to judicial acts; fourthly, to extra-judicial acts; The application of this maxim in support of possession and user, especially where there has been long and peaceable enjoyment, will, from its importance, be reserved for separate consideration (*f*).

(*y*) 3 Benth. Jud. Ev. 213.

(*z*) See *infrà*, sub-sect. 5.

(*a*) *Infrà*, § 362.

(*b*) "The probative force of posterior events in regard to prior ones is naturally much stronger than that of prior events with regard to posterior ones. In all human affairs, execution is better evidence of design than design of execution. Why? Because human designs are so often frustrated." 3 Benth. Jud. Ev. 213, 215, 216.

(*c*) 1 Greenl. Ev. § 20, 7th Ed.; *White* v. *Foljambe*, 11 Ves. 337, 350.

(*d*) *Doe* d. *Wilkins* v. *Marquis of Cleveland*, 9 B. & C. 864; *Rees* d. *Chamberlain*, v. *Lloyd*, Wightw. 123; *Isack* v. *Clarke*, 1 Ro. 132; *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 503.

(*e*) *Earl* d. *Goodwin* v. *Baxter*, 2 W. Bl. 1228; *White* v. *Foljambe*, 11 Ves. 350.

(*f*) *Infrà*, sub-sect. 5.

§ 356. 1. With respect to official appointments. It is a general principle, that a person's acting in a public capacity is primâ facie evidence of his having been duly authorised so to do (*g*);[1] and even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production (*h*). There are numerous instances to be found of the application of this principle. It has been held to apply to justices of the peace (*i*), churchwardens and overseers (*k*), surrogates (*m*), commissioners for taking affidavits (*n*),[2] attorneys (*o*), under-sheriffs (*p*), peace officers and constables (*r*), persons in the employment of the Post Office (*s*), and vestry clerks (*t*); while it has been expressly extended by statute to revenue officers (*x*). And it holds in criminal cases as well as in civil. A strong illustration is to be found in *R.* v. *Winifred* and *Thomas Gordon* (*y*), who were indicted for the murder of a constable in the execution of his office, and where the allegation in the indictment of his being constable was held sufficiently proved by evidence that he acted and was generally known in the parish as such. Both prisoners were convicted, and Thomas Gordon executed, but the female prisoner escaped on another point.

§ 357. This presumption is not restricted to appointments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act (*z*), and to trustees empowered by Act of Parliament to raise money to build a church (*a*). But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority.

(*g*) Ph. & Am. Ev. 452; 1 Phill. Ev. 449, 10th Ed.; *Berryman* v. *Wise*, 4 T. R. 366; *M'Gahey* v. *Alston*, 2 M. & W. 206.

(*h*) Ph. & Am. Ev. 452–453; 1 Phill. Ev. 449, 10th Ed.

(*i*) *Berryman* v. *Wise*, 4 T. R. 366.

(*k*) *Doe* d. *Bowley* v. *Barnes*, 8 Q. B. 1037.

(*m*) *R.* v. *Verelst*, 3 Camp. 432.

(*n*) *R.* v. *James*, 1 Show. 397; *R.* v. *Howard*, 1 M. & R. 187.

(*o*) *Pearce* v. *Whale*, 5 B. & C. 38.

(*p*) *Doe* d. *James* v. *Brawn*, 5 B. & A. 243.

(*r*) *R.* v. *Gorden*, Leach, C. L. 515; *Berryman* v. *Wise*, 4 T. R. 366, per Buller, J.

(*s*) *R.* v. *Rees*, 6 C & P. 606.

(*t*) *M'Gahey* v. *Alston*, 2 M. & W. 206.

(*x*) Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21, s. 24, replacing the repealed 26 Geo. 3, c. 77, s. 12 & c. 82, s. 6; 11 Geo. 1, c. 30, s. 32; 7 & 8 Geo. 4, c. 53, s. 17.

(*y*) Leach, C. L 515, 4th Ed.

(*z*) *Butler* v. *Ford*, 1 Cr. & M. 662.

(*a*) *R.* v. *Murphy*, 8 C. & P. 310, per Coleridge, J. The Acts of Parliament in

[1] The American decisions bear out the same view. Hutchings *v.* Van Bokkelen, 34 Me. 126; Shelbyville *v.* Shelbyville, 1 Metc. (Ky.) 54; Cooper *v.* Moore, 44 Miss. 386; Briggs *v.* Taylor, 35 Vt. 57; Com. *v.* McCue, 16 Gray, 226; State *v.* Roberts, 52 N. H. 492; Druse *v.* Wheeler, 22 Mich. 439; Woodson *v.* State, 24 Tex. App. 153; State *v.* Holcombe, 86 Mo. 371, acc.

[2] The American authorities agree. Forsaith *v.* Clark, 21 N. H. 409, 423; Shermerhorn *v.* Talman, 14 N. Y. 93; Willis *v.* Lewis, 28 Tex. 185.

Thus it does not apply to an executor or administrator (*b*), or a tithe-collector acting under the authority of a private person (*c*), &c.

§ 358. This presumption of the due appointment of public officers seems to rest on three grounds (*d*): 1st, A principle of public policy. 2ndly, In some degree on the ground that, in many cases, not to make it would be to presume that the party acting had been guilty of a breach of the law. 3rdly, That, in the case of public appointments, there are facilities for disproving the regularity of the appointment which do not exist in the case of the agents of private individuals.

§ 359. 2. The maxim, "Omnia præsumuntur ritè esse acta," holds in many cases where acts are required to be done by official persons, or with their concurrence. Thus where, on the face of a composition deed executed under the Bankruptcy Act, 1861 (*e*), there was a written memorandum, stating, among other things required by the Act, that the deed had been duly registered pursuant to the provisions thereof, this was held to be primâ facie evidence that an affidavit containing certain particulars prescribed by the Act was, in pursuance thereof, delivered to the registrar together with the deed (*f*). So the courts will presume in favour of a return to a mandamus (*g*); and where a parish certificate, which appeared to have been signed by only one churchwarden, had been allowed by two justices of the peace, a custom was presumed for the parish to have only one churchwarden (*h*). And Lord Kenyon laid down, that everything is to be intended in support of orders of justices, as contradistinguished to convictions (*i*). This must not, however, be understood to mean that presumptions will be made inconsistent with the manifest probabilities of the case (*k*).

§ 360. 3. We next come to the consideration of judicial acts. These, from their very nature, are in general susceptible of more

that case — namely, the 56 Geo. 3, c. xxix. and 1 & 2 Geo. 4, c. xxiv. — are stated in the report to be *private* acts, but contained common form clauses declaring them public acts.

(*b*) Previous to 15 & 16 Vict. c. 76, s. 55, executors and administrators were bound, in pleading, to make profert of the probate, or letters of administration. 1 Chit. Pl. 420, 6th Ed.

(*c*) *Short* v. *Lee*, 2 Jac. & W. 468.

(*d*) Many of the cases in the books rest on a totally distinct ground; namely, that the party against whom the evidence was offered had, by words or acts, admitted the character of the person described as an officer.

(*e*) 24 & 25 Vict. c. 134, s. 192.

(*f*) *Waddington* v. *Roberts*, L. Rep., 3 Q. B. 579. And see *Grindell* v. *Brendon*, 6 C. B. N. S. 698.

(*g*) Per Buller, J., in *R.* v. *Lyme Regis*, 1 Doug. 159.

(*h*) *R.* v. *Catesby*, 2 B. & C. 814. See also *R.* v. *Hinckley*, 12 East, 361, and *R.* v. *Bestland*, 1 Wils. 128.

(*i*) *R.* v. *Morris*, 4 T. R. 552. See also *R.* v. *Stockton*, 5 B. & Ad. 546.

(*k*) *R.* v. *Upton Gray*, 10 B. & C. 807.

regular proof; so that the maxim, "Omnia præsumuntur ritè esse acta," has here a much more limited application. "With respect to the general principle of presuming a regularity of procedure," says Sir W. D. Evans, "it may perhaps appear to be the true conclusion that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity.[1] This principle, however, ought not to be carried too far; and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists" (*l*). It is a principle that *irregularity* will not be presumed (*m*); and there are several instances to be found in the books of the courts dispensing with formal proof of things necessary, in strictness, to give validity to judicial acts. Thus a fine was presumed to have been levied with proclamations (*n*) even before 11 & 12 Vict. c. 70; and where a recovery had been suffered by a person who had power to do so, the maxim, "Omnia præsumuntur ritè esse acta," applied until the contrary appears (*o*). So it is a rule never to raise a presumption for the sake of overturning an award, but, on the contrary, to make every reasonable intendment in its support (*p*); although there are cases in the books which it might be difficult to reconcile with this principle.

§ 361. The maxim, "Omnia præsumuntur ritè esse acta," does not apply to give jurisdiction to magistrates, or other inferior tribunals (*q*).[2] Thus, where a power was given to justices of the peace, under a mutiny act, to take the examination of a soldier quartered at the place where the examination was taken; and the examination, when taken, did not show on the face of it that the soldier was quartered at that place, — the Court of Queen's Bench held the

(*l*) 2 Ev. Poth. 336.

(*m*) Macnam. Null. and Irregul. 42; per Anderson, B., in *Caunce* v. *Rigby*, 3 M. & W. 68; *James* v. *Heward*, 3 G. & Dav. 264.

(*n*) 3 Co. 86 b.

(*o*) 3 Stark. Ev. 961, 3rd Ed.

(*p*) Caldwell, Arbitr. 132, 2nd Ed.; Watson, Aw. 175, 176, 3rd Ed.; Russell, Arbitr. 268, 681, 3rd Ed.; 3 Bulst. 66–67.

(*q*) *R.* v. *Hulcott*, 6 T. R. 583; *R.* v. *All Saints' Southampton*, 7 B. & C. 785; *Carratt* v. *Morley*, 1 Q. B. 18; *Dempster* v. *Purnell*, 4 Scott, N. R. 30; *Anon.* 1 B. & Ad. 386, n.; *R.* v. *Totness*, 11 Q. B. 80; *R.* v. *Bloomsbury*, 4 E. & B. 520.

[1] So of the American cases. Tolmie *v.* Thompson, 3 Cranch, C. Ct. 123; State *v.* Farish, 23 Miss. 483; Merritt *v.* Baldwin, 6 Wis. 439; Redmond *v.* Anderson, 18 Ark. 449; Hopper *v.* Fisher, 2 Head, 253.

[2] The American law is the same. Goulding *v.* Clark, 34 N. H. 148; Graham *v.* Whitely, 26 N. J. L. 254, 262; Swain *v.* Chase, 12 Cal. 283, acc. But it is only on the question of jurisdiction. That fact being established, the so called presumption (see § 296, n. 1, B. V., *supra*) continues to apply. Slicer *v.* Bank of Pittsburg, 16 How. (U. S.) 571; State *v.* Hinchman, 27 Pa. St. 479; Outlaw *v.* Davis, 27 Ill. 467; Bumpus *v.* Fisher, 21 Tex. 561; Com. *v.* Bolkom, 3 Pick. 280; Tharp *v.* Com., 3 Metc. (Ky.) 411; Sheldon *v.* Wright, 7 Barb. (N. Y.) 39; Com. *v.* Brown, 123 Mass. 410.

examination not to be receivable for the purpose of proving a settlement, unless it were shown by evidence that the soldier was so quartered at the time (*r*).

§ 362. 4. We next proceed to consider the application of this maxim to extra-judicial acts, such as written instruments, and matters in pais. Thus, it is an established rule that deeds, wills, and other attested documents which are thirty years old or upwards, and are produced from an unsuspected repository, prove themselves; although it is still competent to the opposite party to call witnesses to disprove the regularity of the execution (*s*). And there are many instances of the application of this presumption, even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery (*t*). So where an agreement is stated to have been reduced to writing, signing will be presumed (*u*).

§ 363. The Wills Act, 7 Will. 4, and 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), requires wills to be in writing, and executed with certain formalities; and somewhat similar provisions, with reference to wills of real estate, were contained in the statute previously in force, the 29 Car. 2, c. 3, s. 5 (*x*). Under both statutes the courts have, in many instances, applied the maxim, "Omnia præsumuntur ritè esse acta," to the execution of wills; and, as a general principle, they lean in favour of a fair will, so as not to defeat it for a slip in form, where the intention of the legislature has been complied with (*y*).[1]

§ 364. So collateral facts requisite to give validity to instruments will, in general, be presumed. Thus, where an instrument has been lost, it will be presumed to have been duly stamped (*z*); and where a party refuses to produce a document after notice, it will be presumed, at least as against him, to have been duly stamped, unless the contrary

(*r*) *R.* v. *All Saints', Southampton*, 7 B. & C. 785.

(*s*) 2 Phill. Ev. 245 *et seq.*, 10th Ed. Vide *suprà*, bk. 2, pt. 3, ch. 1, §§ 220–221.

(*t*) *Burling* v. *Paterson*, 9 C. & P. 570; *Ball* v. *Taylor*, 1 C. & P. 417; *Grellier* v. *Neale*, 1 Peake, 146; *Talbot* v. *Hodson*, 7 Taunt. 251.

(*u*) *Rist* v. *Hobson*, 1 Sim. & S. 543.

(*x*) *Suprà*, bk. 2, pt. 3, ch. 1, § 222.

(*y*) *Right, Lessee of Cater* v. *Price*, 1 Dougl. 241, 243; *Bond* v. *Seawell*, 3 Burr. 1773; 1 Jarman, Wills, 75 *et seq.*; *In the goods of Huckvale*, L. Rep., 1 P. & D. 375.

(*z*) *Suprà*, § 230.

[1] For two American cases, see Hill *v.* Lord, 48 Me. 83; Maverick *v.* Austin, 1 Bailey (S. C.), 59, acc.

appears (*a*). Where an ejectment was brought on the assignment of a term, given by the defendant to secure the payment of an annuity, it was held unnecessary for the plaintiff to prove that the annuity had been enrolled in pursuance of the 17 Geo. 3, c. 26; as, if it were not enrolled, that would more properly come from the other side (*b*). This principle has also been extended to the construction of instruments. Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties (*c*); as, for instance, where property was conveyed by lease and release, both of which were contained in one deed, the presumption was, that the lease had been executed first (*d*). So, in construing a deed or will, words may be transposed, in order to carry into effect the manifest intention of the parties (*e*).

§ 365. It only remains to add, that the principle in question has been much extended by modern statutes. We have already alluded to this subject, when treating of the history of the rise and progress of the English law of evidence (*f*).

(*a*) *Suprà*, § 230; *Crisp* v. *Anderson*, 1 Stark. 35.

(*b*) *Doe* d. *Griffin* v. *Mason*, 3 Camp. 7. See acc. *Doe* d. *Lewis* v. *Bingham*, 4 B. & A. 672; and *The Brighton Railway Co.* v. *Fairclough*, 2 Man. & G. 674.

(*c*) *Barker* v. *Keete*, 1 Freem. 251; *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 106.

(*d*) Per North, C. J., in *Barker* v. *Keete*, 1 Freem. 251.

(*e*) *Parkhurst* v. *Smith*, Willes, 327, 332, and the cases there cited; *Richards* v. *Bluck*, 6 C. B. 441.

(*f*) Bk. 1, pt. 2, § 118.

Sub-Section V.

PRESUMPTIONS FROM POSSESSION AND USER.

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§ 366. The presumption of right in a party who is in the possession of property, or of that quasi possession of which rights only occasionally exercisable are susceptible, is highly favoured in every system of jurisprudence (*g*), and seems to rest, partly on principles of natural justice, and partly on public policy. By the law of England, possession or quasi possession, as the case may be, is primâ facie evidence of property (*h*), — "Melior (potior) est conditio possidentis" (*i*); and the possession of real estate, or the perception of the

(*g*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16; Dig. lib. 50, tit. 17, ll. 126 & 128; Cod. lib. 4, tit. 19, l. 2; Sext. Decret. lib. 5, tit. 12, De Reg. Jur. Reg. 65; Co. Litt. 6 b.

(*h*) Ph. & Am. Ev. 472; 1 Phill. Ev. 484, 10th Ed.; 4 Taunt. 547; 2 Wms. Saund. 47 f, 6th Ed.

(*i*) 2 Inst. 391; 4 *Id.* 180; Plowd. 296; Hob. 103, 199; Vaugh. 60; 1 T. R. 153; 4 *Id.* 564.

rents and profits from the person in possession, is primâ facie evidence of the highest estate in that property; namely, a seisin in fee (*k*). But the strength of the presumption, arising from possession of any kind, is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others who, supposing it illegal, were interested in putting an end to it. The rule is, that where the facts show the long-continued exercise of a right, the court is bound to presume a legal origin, if such be possible, in favour of the right (*l*). And in such cases the courts have presumed not only that the right had a legal origin, but many collateral facts, so as to render the title of the possessor complete, according to the maxim, "Ex diuturnitate temporis, omnia præsumuntur solenniter esse acta" (*m*).[1]

§ 367. In treating this important subject, it is proposed to consider, 1st, The presumption from long user, of prescriptive and other rights, to things which lie in grant, both at common law, and as affected by the statutes 2 & 3 Will. 4, cc. 71 and 100. 2ndly, Incorporeal rights not affected by those statutes. 3rdly, Presumptions of facts in support of beneficial enjoyment.

§ 368. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognise that of "prescription," or undisturbed possession or user for a period of time, longer or shorter as fixed by law (*n*). "Præscriptio est titulus ex usu et tempore, substantiam capiens ab authoritate legis" (*o*). According to the common law of England, this species of title cannot be made to land or corporeal hereditaments (*p*), or to such incorporeal rights as must arise by matter of record (*q*); and it is in general restricted to things which may be created by grant (*r*), such as rights of common,

(*k*) B. N. P. 103; *Jeyne* v. *Price*, 5 Taunt. 326; *Denn* d. *Tarzwell* v. *Barnard*, Cowp. 595; *Crease* v. *Barrett*, 1 C. M. & R. 931; *R.* v. *Overseers of Birmingham*, 1 B. & S. 763, 768, 770; *Metters* v. *Brown*, 1 H. & C. 686, 689.

(*l*) *Johnson* v. *Barnes*, L. R., 7 C. P. 592; *S. C.*, in Cam. Scac., 8 *Id.* 527.

(*m*) Co. Litt. 6 b; Jenk. Cent. 4, Cas. 77; Palm. 427. This maxim is clearly a case where priora præsumuntur à posterioribus. See *suprà*, sub-sect. 4, § 354.

(*n*) Introd. pt. 2, § 43.

(*o*) Co. Litt. 113 a.

(*p*) Doct. & Stud. Dial. 1, c. 8; Finch, Comm. Laws, 31; Vin. Abr. Presc. B. pl. 2; Brooke, Abr. Presc. pl. 19; *Wilkinson* v. *Proud*, 11 M. & W. 33. A man may, however, prescribe to hold land as tenant in common with another. (Littleton, sect. 310; Brooke, Abr. *in loc. cit.*, and Trespass, 122.)

(*q*) Co. Litt. 114 a; 5 Co. 109 b; Com Dig. Franchises, A. 2.

(*r*) 2 Blackst. Comm. 265; 3 Cruise's Dig. 423, 4th Ed.; 1 Vent. 387.

[1] So of American authorities. Desverges *v.* Desverges, 31 Ga. 753; Austin *v* Bailey, 37 Vt 219, 223; Freeman *v.* Thayer, 33 Me. 76; Winkley *v.* Kaime, 32 N. H. 268; Coxe *v.* Deringer, 78 Pa. St. 271.

easements, franchises which can be created by grant without record, &c. The reason for this is said to be, that every prescription supposes a grant, or some equivalent document, to have once existed, and to have been lost by lapse of time (*s*).[1] According to some eminent authorities, no claim by prescription could be made at the common law against the crown (*t*), on the principle "nullum tempus occurrit regi," — a principle which has been broken in upon by the Nullum Tempus Act, 9 Geo. 3, c. 16, and other statutes.

§ 369. Customary rights differ from prescriptive in this, — that the former are usages applicable to a district or number of persons, while the latter are rights claimed by one or more individuals, or by a corporation (*u*), as existing either in themselves and their ancestors or predecessors, or as annexed to particular property (*x*). The latter is called prescribing in a *que estate*, or, in other words, laying the prescription in the party and those whose estate he has. And here it is necessary to observe that, at the common law, every prescription must have been laid in the tenant of the fee simple; and that parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates, but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducing their own title from him (*y*).

§ 370. A prescriptive or customary right, in order to be valid, must have existed undisturbed from time immemorial (*z*); by which at the common law was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence (*a*); and the right was pleaded, by alleging it to have existed "from time whereof the memory of man runneth not to the

(*s*) 2 Blackst. Comm. 265; Butl. Co. Litt. 261 a, n. (1); *Potter* v. *North*, 1 Ventr. 387; 13 Hen. VII. 16 B. pl. 14.

(*t*) 2 Ro. Abr. 264, Prescription, C.; Com. Dig. Præsc. F. 1; Plowd. 243; 38 Ass. pl. 22. See, however, Plowd. 322; Hargr. Co. Litt. 119 a, n. (1); 114 b; 2 Inst. 168. It is difficult to see the reason of this, if it be true, as stated in most of the books, that every prescription presupposes a grant before the time of legal memory (see the preceding note); and it is well known that a grant within the time of legal memory may be presumed against the crown (*Infrà.*)

(*u*) Co. Litt. 113 b; 4 Co. 32 a; 3 Cruise's Dig. 422, 4th Ed.

(*x*) Co. Litt. 113 b, 121 a; 2 Blackst. Comm. 265.

(*y*) 2 Blackst. Comm. 264, 265.

(*z*) 1 Blackst. Comm. 76; Litt. sect. 170.

(*a*) Co. Litt. 115 a; Litt. sect. 170.

[1] For instances of the very common rule in America that the same presumption extends to corporeal as to incorporeal hereditaments, see Hurst *v.* M'Neil, 1 Wash. C. Ct. 70; Farrar *v.* Merrill, 1 Greenl. 17; Williams *v.* Donell, 2 Head (Tenn.), 695; Glass *v.* Gilbert, 58 Pa St. 266; Grimes *v.* Bastrop, 26 Tex. 310; Townsend *v.* Downer, 32 Vt. 183; Rooker *v.* Perkins, 14 Wis. 79; Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310.

contrary" (*b*). But when the stat. West. 1 (3 Edw. I.), c. 39, had fixed a time of limitation in the highest real actions known to the law, it was considered unreasonable to allow a longer time in claims by prescription. Accordingly, by an equitable construction of that statute, a period of *legal* memory was established, — in contradistinction to that of *living* memory, — by which every prescriptive claim was deemed indefeasible if it had existed from the first day of the reign of Richard I. (A. D. 1189) (*c*); and, on the other hand, to be at once at an end if shown to have had its commencement since that period (*d*).

§ 371. After the time of limitation had been further reduced to sixty years by 32 Hen. 8, c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. 1, c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before (*e*). But the stat. 32 Hen. 8, c. 2, affected the subject in this way, that whereas previously a man might have prescribed for a right, the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted that no person should make any prescription by the seisin or possession of his ancestors or predecessors, unless such seisin or possession had been within sixty years next before such prescription made.

§ 372. A prescriptive title once acquired may be destroyed by interruption. But this must be understood to be an interruption of the right, not simply an interruption of the user (*f*). Thus a prescriptive right may be lost or extinguished by an unity of possession of the right, with an estate in the land as high and perdurable as that in the subject-matter of the right (*g*); as, for instance, where a party entitled in fee to a right of way or common becomes seised in fee of the soil to which it is attached. But the taking any lesser estate in the land only suspends the enjoyment of the subject-matter of the prescription, without extinguishing the right to it, which accordingly revives on the determination of the particular estate (*h*).

§ 373. The time of prescription thus remaining unaltered, it is obvious that if strict proof were required of the exercise of the

(*b*) Litt. sect. 170; 2 Ro. Abr. 269, Prescrip. M. pl. 16.

(*c*) Co. Litt. 115 a.

(*d*) *Id.*; 2 Blackst. Comm. 31; 2 Inst. 238; 3 Cruise's Dig. 425, 4th Ed.

(*e*) 2 Blackst. Comm. 31, n. (*u*); Gale on Easements, 89, 3rd Ed.

(*f*) Co. Litt. 114 b; *Canham* v. *Fisk*, 2 C. & J. 126, per Bayley, B.

(*g*) 3 Cruise's Dig. 428, 4th Ed.; Co. Litt. 114 b; 4 Co. 38 a; *R.* v. *Hermitage*, Carth. 241.

(*h*) 3 Cruise's Dig. 426, 4th Ed.

supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the courts. Modern possession and user being primâ facie evidence of property and right, the judges attached to them an artificial weight, and held that when uninterrupted, uncontradicted, and unexplained, they constituted proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

The length of possession and user necessary for this purpose depends in some degree on circumstances and the nature of the right claimed. On a claim of modus decimandi, where there is nothing in the amount of the sum alleged to be payable in lieu of tithe, inconsistent with its having been an immemorial payment, the regular proof should be payment of that amount in lieu of tithe, by the parish, township, or farm, as far back as *living* memory will reach; coupled with evidence that, during that period, no tithes in kind have ever been paid in respect of that parish, township, or farm (*i*). So, generally, in the case of other things to which a title may be made by prescription, proof of enjoyment as far back as living memory raises a presumption of enjoyment from the remote era (*k*). And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years. "If," says Alderson, B., in the case of *Jenkins* v. *Harvey* (*l*), "an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, were not sufficient to establish a right like the present" (*i. e.*, a right to a toll on all coal brought into a port), "there are innumerable titles which could not be sustained." In that case — the judge at nisi prius having directed the jury that he was not aware of any rule of law which precluded them from presuming the immemorial existence of the right from the modern usage — the Court of Exchequer held the direction improper; and that the correct mode of presenting the point to the jury would have been that, from the uninterrupted modern usage, they should find the immemorial existence of the payment, unless some evidence was given to the contrary (*m*). And so where the question was, whether a certain mode of fishing in a river could be considered as *lawfully in use* at the time of the passing of the

(*i*) *Bree* v. *Beck*, 1 Younge, 244; *Chapman* v. *Monson*, 2 P. Wms. 565; *Moore* v. *Bullock*, Cro. Jac. 501; *Lynes* v. *Lett*, 3 Y. & J. 405; *Chapman* v. *Smith*, 2 Ves. Sen. 506.

(*k*) First Report of Real Property Commissioners, 51; *Blewett* v. *Tregonning*, 3 A. & E. 554, per Littledale, J.; *R.* v. *Carpenter*, 2 Show. 48.

(*l*) 1 C. M. & R. 895.

(*m*) *Id.* 877; and see *Shephard* v. *Payne*, 16 C. B. N. S. 132; *Lawrence* v. *Hitch*, L. Rep., 3 Q. B. 521, 532. Vide *suprà*, sect. 1, sub sect. 2, § 326.

Salmon Fishery Act, 1861 (*n*), *by virtue of a grant* within the meaning of sect. 12 of that Act; and there was evidence that the mode of fishing in question had been enjoyed for sixty years and as far back as living memory extended, in substantially the same manner as it was in 1861, — the court held that the commissioners under the Act might and ought to have found that the right of fishing in that particular way did exist, by grant from all the proprietors in the river whose interests could be affected thereby (*o*).

In an old case of *Bury* v. *Pope* (*p*) it was agreed by all the judges that a period of thirty or forty years was insufficient to give such a title to lights as would enable the owner of the land to maintain an action against the possessor of the adjoining soil for obstructing them. But this is inconsistent with the modern cases of *Cross* v. *Lewis* (*q*) and *R.* v. *Joliffe* (*r*). The latter of these was a quo warranto, calling on the defendant to show upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. The defendant set up an immemorial custom for the jury of the court leet to present a fit person to be mayor of the borough, who presented him, the defendant; to which the crown replied an immemorial custom, for the court leet to present a fit person to be bailiff, and that at the court by which the defendant was presented to be mayor, the steward nominated the persons composing the jury, and issued his precept to the bailiff to summon them, who did so accordingly; whereas by the law of the land the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. To this the defendant rejoined that from time immemorial the steward used to nominate the jurors; and at the trial it was proved that for more than twenty years such had been the practice. This was not answered by any evidence on the part of the crown, and thereupon Burrough, J., who tried the case, told the jury that slight evidence, if uncontradicted, became cogent proof; and a verdict was given for the defendant. A rule was obtained for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury; and Abbott, C. J., after argument, expressed himself as follows: "Upon the evidence given, uncontradicted and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had *recommended* them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is

(*n*) 24 & 25 Vict. c. 109.
(*o*) *Leconfield* v. *Lonsdale*, L. Rep., 5 C. P. 657.
(*p*) Cro. El. 118.
(*q*) 2 B. & C. 686.
(*r*) *Id.* 54.

that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy." Holroyd and Best, JJ., concurring, the rule was discharged.

§ 374. Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the right claimed. This subject is well illustrated by the case of *R.* v. *Archdall* (*s*). In delivering the judgment of the court in that case, Littledale, J., says (*t*): "It follows almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period: a little advance is made at one time, a retreat at another; something is added or taken away, from indiscretion, or ignorance, or through other causes; and when by the lapse of years, the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So, also, with regard to title: if that which has existed from time immemorial be scrutinised with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection; that, indeed, will become a source of weakness which ought to give security and strength. It has therefore always been the well-established principle of our law to presume everything in favour of long possession; and it is every day's practice to rest upon this foundation the title to the most valuable properties." There are several other cases illustrative of this principle. Thus, in *Bailey* v. *Appleyard* (*x*), it is laid down by Coleridge, J., that a plea of prescription will be supported by proof of a prescriptive right larger than that claimed, but of such a nature as to include it. And in *Welcome* v. *Upton* (*y*), Alderson, B., asks, "Would the claim of a party to a right of way be defeated by showing that some person had narrowed it by a few inches?" On the other hand, however, a general prescription is not supported by proof of a prescriptive right coupled with a condition (*z*).

§ 375. Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right, still it is entitled to its legitimate weight as evidence from which, coupled with other circumstances, the jury may find the existence of the right.

(*s*) 8 A. & E. 281.

(*t*) P. 288.

(*x*) 8 A. & E. 161, 167. See *The Bailiffs of Tewkesbury* v. *Bricknell*, 1 Taunt. 142.

(*y*) 6 M. & W. 536, 540.

(*z*) *Paddock* v. *Forrester*, 3 Scott, N. R. 715; 3 M. & Gr. 903, and the cases there cited.

§ 376. The presumption of prescriptive right, derived from enjoyment, however ancient, is instantly put an end to when the right is shown to have originated within the period of legal memory (*a*); and it is of course liable to be rebutted by any species of legitimate evidence, direct or presumptive (*b*); or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time of Richard I. (*c*). The existence of an ancient grant without date is not, however, necessarily inconsistent with a prescriptive right; for the grant may either have been made before the time of legal memory, or in confirmation of a prescriptive right (*d*). So, in *Scales* v. *Key* (*e*), — which arose on a question of an alleged false return to a mandamus, the issue being as to the existence of an immemorial custom within the city of London, — the jury found that the custom existed up to 1689; and there being no proof of its having been either exercised or interfered with at any later time, this was held sufficient to entitle the defendants, who alleged the custom, to have the verdict entered in their favour. So, in *Biddulph* v. *Ather* (*f*), where, in support of a prescriptive right to wreck, evidence was adduced of uninterrupted usage for ninety-two years, — it was held not to be *conclusively* negatived by two allowances in eyre 400 years previous, and a subsequent judgment in trespass; and the judge having left the whole case to the jury, who found in favour of the claim, the court refused to disturb the verdict. So, a prescriptive claim to a right of way for the defendant and his servants, tenants and occupiers of a certain close; and a justification as his servant and by his command is not necessarily disproved by showing that the land had, fifty years before, been part of a large common, which was enclosed under the provisions of an enclosure act, and allotted to the ancestor of the defendant. And, the jury having found for the defendant, a rule obtained to enter a verdict for the plaintiff was discharged after argument, — Parke, J., observing that there was no rule of law which militated against the finding; because from the usage the jury might infer that the lord, if the fee were in him before the enclosure, had the right of way (*g*). So it is laid down by Sir J. Leach, V.-C., that in the case of a modus decimandi, ancient documents cannot prevail against all proof of usage, unless they are consistent with each other, and unless the effect of them excludes, not the probability, but the possibility of the modus (*h*).

(*a*) 2 Blackst. Comm. 31; *Fisher* v. *Lord Graves*, 3 E. & Y., Tithe C. 1180.

(*b*) See *Taylor* v. *Cook*, 8 Price, 650, and the cases cited in the preceding notes.

(*c*) See *Bryant* v. *Foot*, L. Rep., 2 Q. B. 161; (in Cam. Scac.) 3 *Id.* 497.

(*d*) *Addington* v. *Clode*, 2 W. Bl 989.

(*e*) 11 A & E. 819. See also *Welcome* v. *Upton*, 6 M. & W. 536.

(*f*) 2 Wils. 23.

(*g*) *Codling* v. *Johnson*, 9 B. & C. 933. See further on this subject, *Hill* v. *Smith*, 10 East, 476; *Schoobridge* v. *Ward*, 3 M. & Gr. 896.

(*h*) *White* v. *Lisle*, 4 Madd 224.

§ 377. Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user however strong, was liable to be altogether defeated, by showing the origin of the claim at any time since the 1 Rich. 1 (A. D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident.[1] "Tempus," says Sir Edward Coke, "est edax rerum (*i*); and records and letters patent, and other writings, either consume or are lost, or embezzled; and God forbid that ancient grants and acts should be drawn in question, although they cannot be shown, which, at the first, was necessary to the perfection of the thing" (*k*). Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession (*l*), the judges attached an artificial weight to the possession and user of such matters as lie in grant, where no prescriptive claim was put forward; and in process of time they established it as a rule that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant, or other lawful origin of the possession (*m*). This period of twenty years seems to have been adopted by analogy to the Statute of Limitations, 21 Jac. 1, c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment. For, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land (*n*). The practical effect of this quasi præsumptio juris was considerably increased by the decision in *Read* v. *Brookman* (*o*); namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profert of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an incorporeal here-

(*i*) 12 Co. 5.

(*k*) *Id.*

(*l*) *Bright* v. *Walker*, 1 C. M. & R. 217; *Eldridge* v. *Knott*, Cowp. 215.

(*m*) 3 Stark. Ev. 911, 3rd Ed.; 1 Greenl. Ev. § 17, 7th Ed.; 2 Wms. Saund. 175 a, 6th Ed.; *Bealey* v. *Shaw*, 6 East, 208; *Balston* v. *Bensted*, 1 Camp. 463; *Wright* v. *Howard*, 1 S. & Stu. 203; *Campbell* v. *Wilson*, 3 East, 294; *Lord Guernsey* v. *Rodbridges*, 1 Gilb. Eq. R. 4; *Bright* v. *Walker*, 1 C. M. & R. 217.

(*n*) 3 Stark. Ev. 911, 3rd Ed.; 2 Wms. Saund. 175 *et seq.*, 6th Ed., and the cases there cited.

(*o*) 3 T. R. 151.

[1] See, for American law, Fritz *v.* Brandon, 78 Pa. St. 342, 355; Cheny *v.* Watkins, 1 Har. & J. 527; Jarboe *v.* McAtee, 7 B. Monr. 279; Nixon *v.* Carco, 28 Miss. 414; Hurst *v.* M'Neil, 1 Wash. C. Ct. 70, 80, acc.

ditament, to allege a feigned grant within the time of legal memory, from some owner of the land or other person capable of making such grant to some tenant or person capable of receiving it (*p*), setting forth the names of the supposed parties to the document (*q*), with the excuse for profert that the document had been lost by time and accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed making title by "non-existing grant."

§ 378. Much confusion has arisen from the loose language to be found in some of the books, on the subject of this presumption. In *Holcroft* v. *Heel* (*r*), — which was an action on the case for disturbance of a market, — it appeared that the grantee of a market, under letters-patent from the crown, had suffered another person to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption; and the Court of Common Pleas held, that such user operated as a *bar* to the plaintiff's right of action (*s*). But in *Darwin* v. *Upton* (*t*), Lord Mansfield says: "The enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an *absolute bar*, like a statute of limitation; it is certainly a *presumptive bar*, which ought to go to the jury." And Buller, J., adds: "If the judge meant it" (*i. e.*, twenty years' uninterrupted possession of windows) "was an absolute bar, he was certainly wrong; if only as a presumptive bar, he was right." The judgment of Lord Mansfield, in *The Mayor of Hull* v. *Horner* (*u*), is to the same effect. Again, the presumption of right from twenty years' enjoyment of incorporeal hereditaments is often spoken of as a "*conclusive* presumption" (*x*), — an expression almost as inaccurate as calling the evidence a "bar." If the presumption be "conclusive" it is a *præsumptio juris et de jure*, and not to be rebutted by evidence; whereas, the clear meaning of the cases is, that the jury ought to make the presumption, and act definitively upon it, unless it is encountered by adverse proof. "The presumption of right in such cases," says Mr. Starkie (*y*), "is not

(*p*) Shelford's Real Property Acts, 57, 7th Ed.

(*q*) *Hendy* v. *Stevenson*, 10 East, 55.

(*r*) 1 B. & P. 400.

(*s*) With reference to this decision it has been said that the action on the case, being a *possessory action*, was probably considered by the court to be in the nature of an ejectment, in which adverse, uninterrupted possession by the defendant, for twenty years, is a bar. 2 Wms. Saund., 6th Ed. 175 c.

(*t*) *Id.*

(*u*) Cowp. 102.

(*x*) 1 Greenl. Ev. § 17, 7th Ed.; per Lord Ellenborough in *Balston* v. *Bensted*, 1 Camp. 463, 465; and *Bealey* v. *Shaw*, 6 East, 208, 215.

(*y*) 3 Stark. Ev. 911, 3rd Ed.

conclusive, — in other words, it is not an inference of *mere law*, to be made by the courts; yet it is an inference which the courts advise juries to make, wherever the presumption stands unrebutted by contrary evidence." [1] It remains to add, that the doctrine in question has only been fully established in modern times, and was not introduced without opposition (*z*).

§ 379. In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; and such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee (*a*). But the acquiescence of the owner of the inheritance may either be proved directly, or inferred from circumstances (*b*). *E. g.*, where, in order to prove that a way was public, evidence was given of acts of user by the public for nearly seventy years; but during the whole of that period the land had been on lease; and the jury were directed that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public, by the owner of the inheritance at a time anterior to the land being leased, — this was held to be a proper direction (*c*). And where the time has once begun to run against the tenant of the fee, the interposition of a particular estate does not stop it (*d*).

§ 380. This presumption only obtains its practically conclusive character when the evidence of enjoyment during the required period remains uncontradicted and unexplained. In *Livett* v. *Wilson* (*e*), where, in answer to an action of trespass, the defendant pleaded a right of way by lost grant, at the trial, before Gaselee, J., there was conflicting evidence as to the undisputed user of the way, and the alleged right had been pretty constantly contested; whereupon the judge told the jury that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a

(*z*) "I will not contend," says Sir W. D. Evans, "that after the decisions which have taken place, it may not be more convenient to the public that the doctrine which has been extensively acted upon in the enjoyment of real estates should be adhered to than departed from, though of very modern origin. . . . But I shall ever retain the sentiment that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority." 2 Ev. Poth. 139.

(*a*) 2 Wms. Saund. 175, 6th Ed., and the cases there cited.

(*b*) *Gray* v. *Bond*, 2 B. & B. 667.

(*c*) *Winterbottom* v. *Lord Derby*, L. Rep., 2 Ex. 316.

(*d*) *Cross v. Lewis*, 2 B & C. 686.

(*e*) 3 Bing. 115. See also *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232, and *Dawson* v. *The Duke of Norfolk*, 1 Price, 246.

[1] The American cases are to the same effect. Rooker *v.* Perkins, 14 Wis. 79; Irvin *v.* Fowler, 5 Rob. (N. Y.) 482; English *v.* Register, 7 Ga. 387; Nieto *v.* Carpenter, 21 Cal. 455; Nichols *v.* Gates, 1 Conn. 318.

deed, and that that deed had been lost, they should find for the defendant, and this ruling was fully confirmed by the court in banc. But the fact of possession for a less period than twenty years is still a circumstance from which, when coupled with other evidence, a jury may infer the existence of a grant (*f*).[1]

§ 381. We have seen that by the common law a title by prescription could not be made against the crown (*g*). But this doctrine was not extended to the case of a supposed lost grant; although in order to raise such a presumption against the crown, a longer time was required than against a private individual (*h*). The same holds where it is sought to require a right in derogation of the rights of the public (*i*).[2]

§ 382. By the general law and of common right, the pews in the body of a church belong to the parishioners at large, for their use and accommodation; but the distribution of seats among them rests with the ordinary, whose officers the churchwardens are, and whose duty it is to place the parishioners according to their rank and station, subject to the control of the ordinary (*k*). But a right to a pew as appurtenant to an ancient *messuage* may be claimed by prescription, which presupposes a faculty (*l*); and it is only in this light — namely, as easements appurtenant to messuages — that the right to pews is considered in courts of common law (*m*). That right is either *possessory* or *absolute*. The ecclesiastical courts will protect a party who has been for any length of time in possession of a pew or seat against a mere disturber, so far at least as to put him on proof of a paramount title (*n*). And where the right is claimed as appurtenant to a messuage within the parish, possession for a long series of years

(*f*) *Bealey* v. *Shaw*, 6 East, 215; see per Tindal, C. J., in *Hall* v. *Swift*, 4 Bing. N. C. 381, 383.

(*g*) *Suprà*, § 368.

(*h*) 1 Greenl. Ev. § 45, 7th Ed.; see *Bedle* v. *Beard*, 12 Co. 4, 5; *Mayor of Hull* v. *Horner*, Cowp. 102; *Gibson* v. *Clark*, 1 Jac. & W. 159; *Roe* d. *Johnson* v. *Ireland*, 11 East, 280; *Jewison* v. *Dyson*, 9 M. & W. 540; *Brune* v. *Thompson*, 4 Q. B. 543.

(*i*) *Weld* v. *Hornby*, 7 East, 195; *Chad* v. *Tilsed*, 2 B. & B. 403; *Vooght* v. *Winch*, 2 B. & A. 662; *R.* v. *Montague*, 4 B. & C. 598.

(*k*) *Corven's case*, 12 Co. 105-106; 3 Inst. 202; *Byerly* v. *Windus*, 5 B. & C. 1; *Pettman* v. *Bridger*, 1 Phillim. 323; *Fuller* v. *Lane*, 2 Add. 425; *Blake* v. *Usborne*, 3 Hagg. N. R. 733.

(*l*) *Parker* v. *Leach*, L. Rep., 1 P. C. 312, 327; *Pettman* v. *Bridger*, 1 Phillim. 324; *Walter* v. *Gunner*, 1 Hagg. C. R. 317; *Wyllie* v. *Mott*, 1 Hagg. N. R. 39.

(*m*) 3 Stark. Ev. tit. Pew, 861, 3rd Ed.

(*n*) *Pettman* v. *Bridger*, 1 Phillim. 324; *Spry* v. *Flood*, 2 Curt. 356.

[1] So of the American cases. Hawkins *v.* Commissioners, 2 All. 254; Ward *v.* McIntosh, 12 Oh. St. 231; Wendell *v.* Blanchard, 2 N. H. 456; Austin *v.* Bailey, 37 Vt. 219; McCall *v.* Pryor, 17 Ala. 533; Hunt *v.* Utter, 15 Ind. 318.

[2] For a conflicting American case, see Grimes *v.* Bastrop, 26 Tex. 310, *contra.*

will give a title against a wrong-doer in a court of common law (*o*). But where the origin of the pew is shown, or the presumption is rebutted by circumstances, the prescriptive claim is at an end (*p*). In order, however, to raise the presumption of a right by prescription or faculty, as against the ordinary, much more is required; and with respect to the length of occupation necessary for this purpose it is difficult to lay down any general rule (*q*).

§ 383. In this state of the law was passed the Prescription Act, 2 & 3 Will. 4, c. 71. Notwithstanding all that had been done by facilitating the proof of prescriptive rights, and allowing the pleading of non-existing grants, cases still occurred in which the length of the time of prescription operated to the defeat of justice. On this subject the Real Property Commissioners expressed themselves as follows (*r*): "In some cases the practical remedy fails, and the rule (of prescription) produces the most serious mischiefs. A right claimed by prescription is always disproved by showing that it did not or could not exist at any one point of time since the commencement of legal memory, &c., &c. Amidst these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seised in fee of the servient, to another seised in fee of the dominant tenement. But besides the objection of its being well known to the counsel, judge, and jury that the plea is unfounded in fact, the object is often frustrated by proof of the title of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the plea. The contrivance therefore affords only a chance of protection, and may stimulate the adversary to an investigation for an indirect and mischievous end, of ancient title-deeds, which for every fair purpose have long ceased to be of any use." There was also this inconvenience, that the evidence necessary to support a claim by lost grant would not support a claim by prescription; so that a plea of the former might miscarry from the evidence going too far (*s*). Add to all which, it was well observed that the requiring juries to make

(*o*) *Darwin* v. *Upton*, 2 Wms. Saund. 175 c, 6th Ed.; *Kenrick* v. *Taylor*, 1 Wils. 326; *Griffith* v. *Matthews*, 5 T. R. 296; 2 R. R. 598; *Jacob* v. *Dallow*, 2 L. Raym. 755.

(*p*) *Griffith* v. *Matthews*, 5 T. R. 296; 2 R. R. 598; *Morgan* v. *Curtis*, 3 Man. & Ry. 389.

(*q*) See *Griffith* v. *Matthews*, 5 T. R 296; 2 R. R. 598; *Pettman* v. *Bridger*, 1 Phill. 325; *Walter* v. *Gunner*, 1 Hagg. C. R. 322; *Woolcoombe* v. *Ouldridge*, 3 Add 6; *Pepper* v. *Barnard*, 12 L. J., Q. B. 361.

(*r*) First Report of the Real Property Commissioners, 51.

(*s*) See per Littledale, J., in *Blewett* v. *Tregonning*, 3 A. & E. 583, 584.

artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed (*t*). In a word, it became at length apparent that the evil could only be remedied by legislation, and the statutes in question were passed for that purpose.

§ 384. The Prescription Act, 2 & 3 Will. 4, c. 71, after reciting that "the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice," for remedy thereof proceeds to enact, in the first section, that no claim which may be lawfully made to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land, except such matters and things as are in the statute specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of *thirty* years, be defeated by showing only that such right, &c., was first taken or enjoyed at any time prior to such period of thirty years, but that nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and further that when such right, &c., shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some express written consent.

By sect. 2, no claim which may be lawfully made to any way or other easement, or to any watercourse, or use of water, to be enjoyed or derived upon, over, or from any land or water when the same shall have been actually enjoyed by any person claiming right thereto without interruption, for the full period of twenty years, shall be defeated by showing only that the same was first enjoyed at any time prior to such period of twenty years, but that, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and further that where the same shall have been so enjoyed as aforesaid for the full period of *forty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some express written consent.

By sect. 3, when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually

(*t*) 2 Stark. Ev. 911, n. (*l*), 3rd Ed; per Parke, B., in delivering the judgment of the court in *Bright* v. *Walker*, 1 C. M. & R. 217–218.

enjoyed therewith for *twenty* years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some express written consent.

By sect. 4, each of these respective periods of years "shall be deemed and taken to be the period next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in, for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made."

§ 385. A large number of decisions on the construction of this important statute are to be found in the books, the discussion of which would be altogether out of place here. There are, however, a few points which require notice: 1. The earlier sections of the statute, being in the affirmative, do not take away the common law, and consequently do not prevent a party pleading a prescriptive claim, or claim by lost grant, in the same manner as he might have done before the Act passed. And it is common in practice for a party to rely in part on the common law, and in part on the statute (*u*). 2. The words in sect. 4 — "some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought in question" — mean, generally, *any* such suit or action; and not, individually, *each* suit or action in which the question may from time to time arise (*x*). 3. The word "presumption," in the 6th section, is used in the sense of *artificial* presumption, or presumption which without any other evidence shifts the burden of proof, the meaning of the section being, that no inference shall be drawn from the *unsupported* fact of an enjoyment for less than the prescribed number of years. But it was not intended to divest enjoyment for a shorter period of its natural weight as evidence, so as to preclude a jury from taking it into consideration, with other circumstances, as evidence of a grant; which accordingly they may still find to have been made, if they are satisfied that it was made in point of fact (*y*). 4. The statute does not apply to easements or profits à prendre *in gross*; *e. g.*, to a claim of free fishery in the waters of another (*z*).

(*u*) See *Blewett* v. *Tregonning*, 3 A. & E 554; *Wilkinson* v. *Proud*, 11 M. & W. 33; *Lowe* v. *Carpenter*, 6 Exch. 825; *Warburton* v. *Parke*, 2 H. & N. 64.

(*x*) *Cooper* v. *Hubbuck*, 12 C. B. N. S. 456, 467.

(*y*) See *Bright* v. *Walker*, 1 C. M. & R. 211.

(*z*) *Shuttleworth* v. *Le Fleming*, 19 C. B. N. S. 687.

§ 386. We have seen that "tithes, rent, and services" are excepted out of the 2 & 3 Will. 4, c. 71, s. 1. The two latter are provided for by the Statute of Limitations, 3 & 4 Will. 4, c. 27 (*b*), the provisions of which are irrelevant to our present purpose; and the former by 2 & 3 Will. 4, c. 100; but the Tithe Commutation Act of 1836, 6 & 7 Will. 4, c. 71, and its many amending acts have rendered this Act practically obsolete.

§ 387. 2. We proceed, in the second place, to consider the presumptions made from user, in cases of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked the presumption of the dedication of highways to the public. "A road," says Littledale, J., in *R.* v. *Mellor* (*e*), "becomes public, by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public." And such dedication may be either general or limited,—*e. g.*, the owner of the soil may dedicate a footway to the public, subject to his right of periodically ploughing it up (*f*). The fact of dedication may either be proved directly, or inferred from circumstances (*g*), especially from that of permissive user on the part of the public. If a man opens his land so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way (*h*), unless some act be done by the owner to show that he had only intended to give a licence to pass over the land, and not to dedicate a right of way to the public (*i*). Among acts of this kind may be reckoned the putting up a bar, or excluding by positive prohibition persons from passing (*k*). The common course is by shutting up the passage for one day in each year (*l*). Where no acts of this nature have been done, there is no fixed rule as to the length of user, which is sufficient, when unaccompanied by other circumstances, to constitute presumptive evidence of a dedication; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. In the

(*b*) Amended materially by "The Real Property Limitation Act, 1874" (37 & 38 Vict. c. 57).

(*e*) 1 B. & Ad. 32, 37. And see *R.* v. *St. Benedict*, 4 B. & A. 447.

(*f*) *Mercer* v. *Woodgate*, L. Rep.; 5 Q. B. 26. *Arnold* v. *Blaker* (in Cam. Scac.), 6 *Id.* 433.

(*g*) *R.* v. *Wright*, 3 B. & Ad. 681; *Surrey Canal Company* v. *Hall*, 1 Man. & Gr. 392; *R.* v. *St. Benedict*, 4 B. & A. 447.

(*h*) *The British Museum* v. *Finnis*, 5 C. & P. 460; *Lade* v. *Shepherd*, 2 Str. 1004.

(*i*) *Barraclough* v. *Johnson*, 8 Ad. & E. 99.

(*k*) *R.* v. *Lloyd*, 1 Camp. 260; *Roberts* v. *Karr*, *Id.* 262, n.; *Lethbridge* v. *Winter*, *Id.* 263, n.

(*l*) Per Patteson, J., in *The British Museum* v. *Finnis*, 5 C. & P. 460, 465. But keeping a gate across a road is not *conclusive* evidence against its being a public way, for it may have been granted with the reservation of keeping a gate in order to prevent cattle from straying. *Davies* v. *Stephens*, 7 C. & P. 570.

case of *The Rugby Charity* v. *Merryweather* (*m*), Lord Kenyon says, that "in a great case, which was much contested, six years was held sufficient;" and where the existence of a highway would be beneficial to the owner of the soil, a dedication has been presumed from a user of four or five years (*n*). But the animus or intention of the owner of the soil in doing the act, or permitting the passage, must be taken into consideration (*o*). "In order," says Parke, B., in *Poole* v. *Huskinson* (*p*), "to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate: there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." And this animus or intention is to be determined by the jury (*q*). But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice (*r*), although the assent of the owner of the inheritance may be inferred from circumstances (*s*). Upon the whole, the public are favoured in questions of this nature (*t*); and it seems that when a road has once been a king's highway, no lapse of time or cessation of user will deprive the public of the right of passage whenever they please to resume it (*u*).[1] The presumption in question can, it is said, be made against the crown (*x*).

§ 388. The next subject calling for attention here is the presumption of the surrender or extinguishment of incorporeal rights by *non-user*. This is altogether unaffected by the Prescription Acts (*y*); and the general principle is thus stated by Abbott, C. J., in *Doe* d. *Putland* v. *Hilder* (*z*): "The long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of

(*m*) 11 East, 376, n.

(*n*) *Jarvis* v. *Dean*, 3 Bing. 447.

(*o*) *Poole* v. *Huskinson*, 11 M. & W. 827; *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877.

(*p*) 11 M. & W. 827, 830.

(*q*) *Barraclough* v. *Johnson*, 8 A. & E. 99; *Surrey Canal Company* v. *Hall*, 1 Man. & G. 392.

(*r*) *Baxter* v. *Taylor*, 1 Nev. & M. 11; *R.* v. *Bliss*, 7 A. & E. 550; *Wood* v. *Veal*, 5 B. & A. 454.

(*s*) *Winterbottom* v. *Lord Derby*, L. Rep., 2 Ex. 316; *Davies* v. *Stephens*, 7 Car. & P. 570; *R.* v. *Barr*, 4 Camp. 16; *Jarvis* v. *Dean*, 3 Bing. 447; *R.* v. *Hudson*, 2 Str. 909; *Harper* v. *Charlesworth*, 4 B. & C. 574.

(*t*) *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877; *R.* v. *Petrie*, 4 E. & B. 737.

(*u*) 2 Selw. N. P. 1362, 9th Ed.; *Dawes* v. *Hawkins*, 8 C. B. N. S. 848, 858.

(*x*) *R.* v. *The Inhabitants of East Mark*, 11 Q. B. 877. See *ante*, §§ 368, 381.

(*y*) Gale on Easements, 529, 4th Ed.

(*z*) 2 B. & A. 782, 791.

[1] The American authority apparently is opposed. Baldwin *v.* City of Buffalo, 29 Barb. 396; Callaway Co. *v.* Nolley, 31 Mo. 393; Alves *v.* Henderson, 16 B. Monr. 131; Knight *v.* Heaton, 22 Vt. 480; Commissioners *v.* Taylor, 2 Bay (S. C.), 282, *contra*.

such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed." But the result of the cases on this subject would seem to be, that the non-user of a privilege or easement is merely evidence of abandonment, and that the question of abandonment is one of fact, which must be determined on the whole of the circumstances of each particular case (*a*).[1]

§ 389. With respect to the presumed extinguishment of "easements" from cessation of enjoyment, the following principles are laid down in a text-work (*b*): "Though the law regards with less favour the acquisition and preservation of these accessorial rights than of those which are naturally incident to property, and therefore does not require the same amount of proof of the extinction as of the original establishment of the right; yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary to give validity to any act of abandonment." Now easements are divided into *continuous* and *intermittent*, — the former being those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as waterspouts, the right to air, light, &c.; and the latter being those of an opposite description, such as rights of way, &c. With respect to *continuous* easements, the correct inference from the cases seems to be, that there is no time fixed by law during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment; but it is for the jury to take all the circumstances of the case into their consideration, in order to see if there has been an intention to renounce the right (*c*).[2] It was held by Lord Ellenborough at nisi prius, that where a window has been shut up for twenty years, the case stands as if it had never existed (*d*).

(*a*) See per Wood, V.-C., *Crossley* v. *Lightowler*, L. Rep., 3 Eq. 279, 292; *Eldridge* v. *Knott*, Cowp. 214; *Simpson* v. *Gutteridge*, 1 Madd. 609.

(*b*) Gale on Easements, 528, 4th Ed.

(*c*) Gale on Easements, 535, 4th Ed., citing *Liggins* v. *Inge*, 7 Bing. 682, 693, per Tindal, C. J.; *Hale* v. *Oldroyd*, 14 M. & W. 788; *Lawrence* v. *Ober*, 3 Camp. 514.

(*d*) *Id.*

[1] The American cases agree. Ballard *v.* Butler, 30 Me. 94; Arnold *v.* Cornman, 50 Pa. St. 361; Taylor *v.* Hampton, 4 McCord, 96; Corning *v.* Gould, 16 Wend. 531; Cen. Wharf *v.* India Wharf, 123 Mass. 567.

[2] For cases in which, in the absence of adverse user by the servient estate, non-user of an easement for considerable time was held insufficient to more than raise a presumption of release or abandonment, see Farrar *v.* Cooper, 34 Me 394, 400; Hatch *v.* Dwight, 17 Mass. 289; Hayford *v.* Spokesfield, 100 Mass. 491; Wiggins *v.* McCleary, 49 N. Y. 346 See also Jennison *v.* Walker, 11 Gray, 423; Owen *v.* Field, 102 Mass. 90, 114.

§ 390. With respect to easements of the *intermittent* kind, there are some expressions to be found in the books which strongly favour the notion that, in order to raise the presumption of extinguishment from non-user alone, it must have reached the full period of twenty years (*e*), in analogy to the Statute of Limitations, and the rule established respecting title by non-existing grant (*f*).[1] But it seems clear that mere intermittance of the user, or slight alterations in the mode of enjoyment, will not be sufficient to destroy the right, when circumstances do not show any intention of relinquishing it (*g*); whilst, on the other hand, a much shorter period than twenty years, when it is accompanied by circumstances such as disclaimer, or other indication of intention to abandon the right, will be sufficient to raise the presumption of extinguishment (*h*).[2]

§ 391. *Licences* may be presumed, and, as a general rule, from a much shorter period of enjoyment than twenty years (*i*).[3]

§ 392. 3. We proceed lastly to the numerous important presumptions of facts which may be made in support of beneficial enjoyment. The general principle governing the subject is thus stated by Tindal, C. J., in *Doe* d. *Hammond* v. *Cooke* (*k*): "No case can be put in which any presumption" (semble, any *artificial* presumption) "has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of

(*e*) Gale on Easements, 561 *et seq.*, 4th Ed., citing Co. Litt. 114 b; *Doe* d. *Putland* v *Hilder*, 2 B. & A. 782, 791, per Abbott, C. J.; *Moore* v. *Rawson*, 3 B. & C. 332, 339, per Littledale, J., *Holmes* v. *Buckley*, 1 Eq. Ca. Abr. 27.

(*f*) *Supra*, § 377.

(*g*) Gale on Easements, 563, 4th Ed., citing *Payne* v. *Shedden*, 1 M. & Rob. 382; *R.* v. *The Inhabitants of Chorley*, 12 Q. B. 515; *Ward* v *Ward*, 7 Exch. 838; *Lovell* v. *Smith*, 3 C. B. N. S 120.

(*h*) Gale on Easements, 567, 4th Ed.; *Norbury* v. *Meade*, 3 Bligh, 241, 242; *Harvie* v. *Rogers*, 3 Bligh N. S. 440, *R.* v. *Chorley*, 12 Q. B. 515; *Ward* v. *Ward*, 7 Exch 838

(*i*) Ph. & Am. Ev. 478; 1 Phill. Ev. 491, 10th Ed.; *Doe* d *Foley* v. *Wilson*, 11 East, 56; *Goodtitle* d. *Parker* v. *Baldwin*, *Id.* 488; *Ditcham* v. *Bond*, 3 Camp. 524; *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P 332.

(*k*) 6 Bing. 174, 179. See, also, 1 Greenl. Ev. § 46, 7th Ed ; 3 Stark. Ev. 935, 3rd Ed.; *The Attorney-General* v. *The St. Cross Hospital*, 17 Beav. 435.

[1] Chandler *v.* Jamaica Pond Aqued. Corp., 125 Mass 544, 549; Carlisle *v.* Cooper, 4 C. E. Green, 256, acc. But an easement acquired by actual deed cannot be lost by mere non-user, however long continued. Wiggins *v.* McCleary, 49 N. Y. 346. *Aliter*, of adverse enjoyment by the servient tenement. Owen *v.* Field, 102 Mass. 90, 114; Noll *v.* Dubuque &c. R. R., 32 Ia 66; Pope *v.* O'Hara, 48 N. Y. 446.

[2] Parkins *v.* Dunham, 3 Strob. 224; Crain *v.* Fox, 16 Barb. 184, acc.

[3] For American cases see Thompson *v* Carr, 5 N. H. 510; Seneca Falls *v.* Zalinski, 8 Hun, 571, acc.

the fact directed to be presumed, and in such cases only, has it ever been allowed." Presumptions of this kind are entitled to additional weight if the possession would otherwise be unlawful, or incapable of satisfactory explanation (*l*). On the other hand, the terms in which the presumption will be brought under the notice of the jury are considerably influenced by the nature of the document or other matter to be presumed, the facility or difficulty of adducing more direct proof, and by the right in question being favoured or disfavoured by law.

§ 393. There is hardly a species of act or document, public or private, that will not be presumed in support of possession.[1] Matters of record generally (*m*), and even Acts of Parliament (*n*), at least very ancient ones (*o*), will thus be presumed; as also will grants from the crown (*p*), letters-patent (*q*), writs of ad quod damnum and inquisitions thereon (*r*), by-laws of corporations (*s*), fines and recoveries (*t*), feoffments (*u*), the enfranchisement of copyholds (*x*), endowment of vicarages (*y*), exemption from tithes (*z*), consent of the ordinary to composition deeds (*a*), powers in charities to sell lands, and sales under such powers (*b*), orders of justices of the peace to stop up roads (*c*), &c. So, likewise, the fact of a particular person having sat in Parliament in ancient times (*d*), the disseverance of tithes by the requisite parties, previous to the restraining statutes (*e*), copyhold customs (*f*), admittance to (*g*) and surrender of copyholds (*h*), sur-

(*l*) 1 Greenl. Ev. § 46, 7th Ed.

(*m*) Plowd. 411; Finch, L. 399, 400; Styl. 22.

(*n*) Skinn. 78; *Lopez* v. *Andrews*, 3 Man. & R. 329, n.; *Eldridge v. Knott*, Cowp. 215, per Lord Mansfield.

(*o*) *R.* v. *The Chapter of Exeter*, 12 A. & E. 532.

(*p*) *Mayor of Hull* v. *Horner*, Cowp. 102, *Gibson* v. *Clark*, 1 Jac. & W. 159; *Read* v. *Brookman*, 3 T. R. 158; *The Attorney-General* v. *The Dean of Windsor*, 24 Beav. 679.

(*q*) *Read* v *Brookman*, 3 T. R. 158; *Pickering* v. *Lord Stamford*, 2 Ves. Jun. 583.

(*r*) *R.* v. *Montague*, 4 B. & C. 598.

(*s*) *Case of Corporations*, 4 Co 78 a.

(*t*) *Read* v. *Brookman*, 3 T. R. 151, 159, per Buller, J., citing *Hasselden* v. *Bradney*, T. 4 Geo. III. C. B. See *Doe* d. *Fenwick* v. *Reed*, 5 B. & A. 232.

(*u*) 21 Edw. IV. 74 B. pl. 5.

(*x*) *Roe* d. *Johnson* v. *Ireland*, 11 East, 289.

(*y*) *Crimes* v. *Smith*, 12 Co. 4; *Wolley* v. *Brownhill*, M'Clel. 317; *Inman* v. *Whormby*, 1 Y. & J. 545; *Apperley* v. *Gill*, 1 C. & P. 316.

(*z*) *Norbury* v. *Meade*, 3 Bligh, 211; *Bayley* v. *Drever*, 1 A. & E. 449; *Rose* v. *Calland*, 5 Ves. 186.

(*a*) *Sawbridge* v. *Benton*, 2 Anst. 372.

(*b*) *St. Mary Magdalen* v. *The Attorney-General*, 6 Ho. Lo. Cas. 189.

(*c*) *Williams* v. *Eyton*, 4 H. & N. 357.

(*d*) *Hastings' Peerage Case*, 8 Cl. & F. 144.

(*e*) *Countess of Dartmouth* v. *Roberts*, 16 East, 334.

(*f*) *Doe* d. *Mason* v. *Mason*, 3 Wils. 63.

(*g*) Watkins on Copyholds, 269, Ed. 1797. See *Rawlinson* v. *Greeves*, 3 Bulst. 237.

(*h*) *Knight* v. *Adamson*, 2 Freem. 106; *Wilson* v. *Allen*, 1 Jac. & W. 611.

[1] For an American decision see Nixon *v.* Car Co., 28 Miss. 414, 431.

render by tenant for life (*i*), and lawful executorship (*k*), will be presumed from lapse of time. In one case it was held that induction might be presumed from fifteen years' undisturbed possession (*l*). And where it is proved that, from a very early period, there has been the constant performance of divine service in an ancient chapel, even although there be no proof that either marriages were solemnised or burials performed therein, this raises the presumption that the chapel was consecrated (*m*). So the lawful origin of a several fishery (*n*), the liability to repair fences (*o*), the right to land nets (*p*), the death of remote ancestors without issue (*q*), mesne assignments of leaseholds (*r*), reconveyances by feoffee to feoffor (*s*), and by mortgagee to mortgagor (*t*), &c., &c., have in like manner been presumed.

§ 394. Under this head comes the important doctrine of the presumption of conveyances by trustees. It is a general rule that whenever trustees ought to convey to the beneficial owner, it should be left to the jury to presume that they have so conveyed, where such presumption can reasonably be made (*u*). This rule has been established to prevent just titles from being defeated by mere matter of form; but it is not easy to determine the extent of it. It may, however, be stated generally that the presumption ought to be one in favour of the owner of the inheritance, and not one against his interest (*x*); and the rule is subject to this further limitation, that the presumption cannot be called for, where it would be a breach of trust in the trustees to make the conveyance (*y*). On the same principle, reconveyances from the trustees to the cestui que trust will be presumed (*z*); as also will, under proper circumstances, conveyances from old to new trustees (*a*).

§ 395. Few subjects have given rise to greater difference of opinion than that of the presumption of the surrender of their terms by

(*i*) 2 Wms. Saund. 42 d, 6th Ed.

(*k*) *R.* v. *Barnsley*, 1 M. & Selw. 377.

(*l*) *Chapman* v. *Beard*, 3 Anst. 942.

(*m*) *Rugg* v. *Kingsmill*, L. Rep., 1 Ad. & Ec. 343, 350; *Moysey v. Hillcoat*, 2 Hagg. N. S. 50.

(*n*) *Malcomson* v. *O'Dea*, 10 Ho. Lo. Cas. 593.

(*o*) *Barber* v. *Whiteley*, 34 L. J. Q. B. 212; *Boyle* v. *Tamlyn*, 6 B. & C. 329.

(*p*) *Gray* v. *Bond*, 2 B. & B. 667.

(*q*) *The Earl of Roscommon's Claim*, 6 Cl. & F. 97; *Doe* d. *Oldham* v. *Woolley*, 8 B. & C. 22.

(*r*) *Earl* d. *Goodwin* v. *Baxter*, 2 W. Bl. 1228; *White* v. *Foljambe*, 11 Ves. 350.

(*s*) *Tenny* d. *Whinnett* v. *Jones*, 3 M. & Scott, 472.

(*t*) *Cooke* v. *Soltau*, 2 S. & Stu. 154.

(*u*) 3 Sugd. V. & P. 25, 42, 43, 10th Ed.; 1 Greenl. Ev. § 46, 7th Ed.; *Doe* d. *Bowerman* v. *Sybourn*, 7 T. R. 2; *Keene* d. *Lord Byron* v. *Deardon*, 8 East, 263, 266; *Viscountess Stafford* v. *Llewellin*, Skin. 77; *Goodtitle* d. *Jones* v. *Jones*, 7 T. R. 43; *Doe* d. *Reede* v. *Reede*, 8 T. R. 122; *England* d. *Syburn* v. *Slade*, 4 T. R. 682.

(*x*) Ph. & Am. Ev. 476, *Doe* d. *Graham* v. *Scott*, 11 East, 483; *Doe* d. *Burdett* v. *Wrighte*, 2 B. & A. 719, 720

(*y*) Ph. & Am. Ev. 476; *Keene* d. *Lord Byron* v *Deardon*, 8 East, 267.

(*z*) *Hillary* v. *Waller*, 12 Ves. 250, 251. See 2 Sugd. V. & P. 196, 10th Ed.

(*a*) *Roe* d. *Eberall* v. *Lowe*, 1 H. Bl. 446.

trustees for terms of years. In Lord Mansfield's time, the courts seem to have entertained notions upon it which, if carried out in practice, would have gone far to enable them, by their own unsupported authority, to subvert trial by jury on the one hand, and confound all distinctions between legal and equitable jurisdiction on the other (*b*). We are informed in *Lade* v. *Holford* (*c*), that "Lord Mansfield declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct the jury to presume it surrendered." There is no objection to the latter branch of this proposition, which has been always recognised in practice; for by not assigning the term for the benefit of the mortgagee, whose money he has received, and afterwards setting it up against him, the mortgagor is guilty of a fraud; so that the presumption of the surrender of the term is really an application of the legal maxim which presumes against fraud and covin (*d*), and also of the rule which forbids a man to take advantage of his own wrong (*e*). And it has accordingly been held, that such a presumption will not be made in favour of a prior mortgagee, against a subsequent mortgagee in possession of the title-deeds, without notice of the prior encumbrance (*f*). But the general proposition, *never to suffer* a plaintiff to be nonsuited by a term outstanding in his trustees, is, at least if taken in its literal sense, inconsistent with principle, and at variance with subsequent authority (*g*). The surrender of a term is a question of *fact;* and the court has not only no right, but it would be most dangerous, to advise a jury to presume such a surrender when all the evidence clearly indicated that it had never been made.

§ 396. The surrender of a term, like any other fact, may be inferred from circumstances (*h*). It is said, however, that the fact of a term having been satisfied is not, when standing alone, sufficient to raise the presumption of a surrender, but that there must be some dealing with the term (*i*).

(*b*) See 3 Sugd. V. & P. 39, 40, 42, 10th Ed.; *Evans* v. *Bicknell*, 6 Ves. 174, 184; *Wallwyn* v. *Lee*, 9 Ves. 31; *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 696.

(*c*) Bull. N. P. 110.

(*d*) See 3 Sugd. V. & P. 42, 10th Ed., and per Abbott, C. J., in *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, 790.

(*e*) See *infrà*, ch. 7.

(*f*) *Goodtitle* d. *Norris* v. *Morgan*, 1 T. R. 755; *Evans* v. *Bicknell*, 6 Ves. Jun. 174, 184.

(*g*) *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684; 1 R. R. 595; *Doe* d. *Bowerman* v. *Sybourn*, 7 T. R. 2; *Doe* d. *Reade* v. *Reade*, 8 *Id.* 118; *Doe* d *Shewen* v. *Wroot*, 5 East, 132.

(*h*) 3 Stark. Ev. 926, n. (*m*), 3rd Ed.; *White* v. *Foljambe*, 11 Ves. 351; *Doe* d. *Brune* v. *Martyn*, 8 B. & C. 497; *Bartlett* v. *Downes*, 3 B. & C. 616.

(*i*) *Evans* v. *Bicknell*, 6 Ves. Jun 174, 185; *Doe* d. *Hodsden* v. *Staple*, 2 T. R. 684; 1 R. R. 595.

§ 397. Where acts are done or omitted by the owner of the inheritance and persons dealing with him as to the land, which ought not reasonably to be done or omitted if the term existed in the hands of a trustee, and there does not appear to be anything that should prevent a surrender from having been made, a surrender of the term may be presumed (*k*). But a term of years assigned to attend the inheritance will not, *as among purchasers or encumbrancers*, be presumed to have been surrendered, merely on the ground of its having remained, for a series of years, unnoticed in marriage settlements and other family documents; and the cases in which a contrary doctrine has been laid down must be considered as overruled (*l*). It seems, however, that in equity a term which has *not* been assigned to attend the inheritance, and which has not been disturbed for a long time, will be presumed to be surrendered, on a question of specific performance between seller and purchaser (*m*).

§ 398. A great change in the law on this subject was effected by the stat. 8 & 9 Vict. c. 112, which, after reciting that "the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate," enacts, in the first section, "that every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every encumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the 31st day of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term." By the 2nd section, "Every term of years now subsisting or hereafter to be created, becoming satisfied after the 31st day of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall

(*k*) Ph. & Am. Ev. 477; 1 Phill. Ev. 490, 10th Ed.; *Doe* d. *Putland* v. *Hilder*, 2 B. & A. 782, 791–792.

(*l*) See on this subject Sugden's V. & P. vol. 3, ch. xv., 10th Ed., where the cases are collected and ably commented on; also *Doe* d. *Lord Egremont* v. *Langdon*, 12 Q. B. 711; *Garrard* v. *Tuck*, 8 C. B. 231; and *Cottrell* v. *Hughes*, 15 C. B. 532.

(*m*) 3 Sugd. V. & P. 66, 10th Ed., citing *Emery* v. *Grocock*, Madd. & G. 54, and *Ex parte Holman*, MS., 24th July, 1821.

immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid." It has been held that the protection to be afforded by this statute is not merely such as might have been set up in a court of law, but such as that a court of equity would not have restrained its being so set up (*n*).

§ 399. Whether, where presumptions are made in support of peaceable or beneficial enjoyment, the jury are bound to *believe* in the fact which they find has been made a question; and there certainly are authorities both ways (*o*). Upon the whole, it may perhaps be safely laid down that, as in all presumptions of this nature legal considerations more or less predominate, the jury ought to find as directed or advised by the judge, unless the suggested fact appears absurd or grossly improbable; in either of which cases, as he ought not to direct or advise them to find such a fact, so neither ought they to find it.

Sub-Section VI.

PRESUMPTIONS FROM THE ORDINARY CONDUCT OF MANKIND, THE HABITS OF SOCIETY, AND THE USAGES OF TRADE.

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§ 400. The presumptions drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade are numerous; and several of them come under the head of presumptions of law. The occupation of land carries with it an implied agreement on the part of the tenant to manage the land according to the course of good husbandry and the custom of the country (*p*). Rent paid by one who is in possession of the land out of which the rent issues, is, in the absence of evidence to the contrary, presumed to be a rent

(*n*) *Doe* d. *Cadwalader* v. *Price*, 16 M. & W. 603; *Cottrell* v. *Hughes*, 15 C. B. 532; *Plant* v. *Taylor*, 7 H. & N. 211; *Owen* v. *Owen*, 3 H. & C. 88.

(*o*) See 3 Stark. Ev. 918 and 926, n. (*m*), 3rd Ed.; *Doe* d. *Newman* v. *Putland*, 3 Sugd. V. & P. 61, 10th Ed., per Richards, C. B., *Hillary* v. *Waller*, 12 Ves. 239, 252, per Sir William Grant, M. R.; *Day* v. *Williams*, 2 C. & J. 459, 460, per Bayley, B.; *St. Mary Magdalen* v. *The Attorney-General*, 3 Jur. N. S. 675, per Lord Wensleydale.

(*p*) *Powley* v. *Walker*, 5 T. R. 373; 2 R. R. 619; *Legh* v. *Hewitt*, 4 East, 154.

service (*q*). So where the mere existence of a tenancy is proved, a tenancy from year to year will be presumed; and if the day of its commencement does not appear, it will be settled by the custom of the country (*r*). Leases for uncertain terms are primâ facie leases at will (*s*); but where a tenant holds over after the expiration of a term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation (*t*). A promise to marry generally is interpreted as a promise to marry within a reasonable time (*x*); and on proof of a regular marriage per verba de præsenti consummation is implied (*y*). The important rule, that confessions and other forms of self-disserving evidence are receivable against the party who makes them (*z*), seems founded on this principle. To this class belong also many presumptions of knowledge. Thus a man is presumed to know what deeds he has executed (*a*), although probably in many cases the presumption is not a strong one; the members of a club (*b*), or a stock exchange (*c*), are presumed to be acquainted with its rules; and parties claiming under a lease are presumed to know the title of their lessor (*d*).

§ 401. There are other presumptions derived from the ordinary conduct of mankind. Thus, the cancelling (*e*), or taking the seals off (*f*), a deed, or tearing a will in pieces (*g*), is primâ facie evidence of revocation. So where a will duly executed remains in the custody of the testator, but cannot be found after his death, the law presumes that the will has been destroyed by the testator, with the intention of revoking it (*h*). But this presumption may be rebutted, by evidence tending to prove a contrary intention; *e. g.*, by declarations of the testator, showing an intention to adhere to the will (*i*).

§ 402. It may be stated as a general rule that primâ facie documents should be taken to have been made or written on the day they

(*q*) See *Hardon* v. *Hesketh*, 4 H. & N. 175.

(*r*) Gresl. Ev. in Eq. 368.

(*s*) *Roe d. Bree* v. *Lees*, 2 W. Bl. 1171, 1173, per De Grey, C. J.

(*t*) *Digby* v. *Atkinson*, 4 Camp. 275; *Johnson* v. *St. Peter's, Hereford*, 4 A. & E. 520; *Hyatt* v. *Griffiths*, 17 Q. B. 505. See also as to continuance of a tenancy with remainderman after death of tenant for life, *Roe* v. *Ward*, 1 H. Bl. 97; 2 R. R. 728.

(*x*) *Potter* v. *De Ross*, 1 Stark. 82; *Phillips* v. *Crutchley*, 3 C. & P. 178; 1 Moore & P. 239

(*y*) *Dalrymple* v. *Dalrymple*, 2 Hagg. 54, 65, 66.

(*z*) See *infrà*, ch. 7.

(*a*) *Palmer* v. *Newell*, 2 Jur. N. S. 268.

(*b*) *Raggett* v. *Musgrave*, 2 C. & P. 556; *Alderson* v. *Clay*, 1 Stark. 405.

(*c*) *Stewart* v. *Cauty*, 8 M. & W. 160; *Mitchell* v. *Newhall*, 15 *Id.* 309.

(*d*) *Patman* v. *Harland*, 17 Ch. D. 353.

(*e*) *Alsager* v. *Close*, 10 M. & W. 576.

(*f*) Latch. 226; *Price* v. *Powell*, 3 H. & N. 341.

(*g*) *In the goods of Colberg*, 2 Curt. 832.

(*h*) *Brown* v. *Brown*, 8 E. & B. 876; *Finch* v. *Finch*, L. Rep., 1 P. & D. 371.

(*i*) *Whiteley* v. *King*, 17 C. B. N. S. 756; *Keen* v. *Keen*, L. Rep., 3 P. & D. 105; *Richards* v. *Gellatly*, L. R., 7 C. P., at p. 131,

bear date (*j*). This has been held to apply to letters (*k*), bills of exchange and promissory notes (*l*), and the indorsements on them (*m*), and also to bankers' cheques (*n*). So a deed is presumed to have been executed (*o*), and delivered (*p*), on the day it is dated. This presumption is, however, easily displaced, at least so far as it relates to the *precise* date; and the rule itself is subject to exceptions (*q*).

§ 403. Many presumptions are drawn from the usual course of business in public offices. With regard to the course of the post, it was in several early cases ruled that, if a letter is put into a post-office, that is primâ facie proof, until the contrary appears, that the party to whom it is addressed received it in due course (*r*).[1] And it appears from more recent authority, that where an offer is made by letter, expressly or impliedly authorising an acceptance by post, and an acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though it may be delayed in delivery (*s*), and even though it may not be delivered at all to the person to whom it is addressed (*t*). This latter position, however, not only necessitates the overruling of a prior well-known judgment (*u*), but it is strongly dissented from by one of the three members of the court who laid it down. The ground of it, however, is that the parties constituted the post-office their agent, so that no direct question of the law of evidence is involved. By some statutes, this sort of proof has been made conclusive in certain cases where the letter is registered (*x*), and in some even where

per Willes, J.; *Wiedeman* v. *Walpole* [1891], 2 Q. B. 534. See *post*, s. 621.

(*j*) *Smith* v. *Battens*, 1 Moo. & Rob. 341; *Anderson* v. *Weston*, 6 Bing. N. C. 296; *Potez* v. *Glossop*, 2 Exch. 191; *Yorke* v. *Brown*, 10 M. & W. 78; *Morgan* v. *Whitmore*, 6 Exch. 716.

(*k*) *Hunt* v. *Massey*, 5 B. & Ad. 902; *Goodtitle* d. *Baker* v. *Milburn*, 2 M. & W. 853; *Potez* v. *Glossop*, 2 Exch. 191. See, however, the observations of Lord Wensleydale in *Butler* v. *Lord Mountgarrett*, 7 Ho. Lo. Cas. 633, 646.

(*l*) *Anderson* v. *Weston*, 6 Bing. N. C. 296.

(*m*) *Smith* v. *Battens*, 1 Moo. & R. 341.

(*n*) *Laws* v. *Rand*, 3 C. B. N. S. 442.

(*o*) *Anderson* v. *Weston*, 6 Bing. N. C. 296, 300.

(*p*) *Stone* v. *Grubbam*, 1 Rol. 3, pl. 5; *Oshey* v. *Hicks*, Cro. Jac. 263.

(*q*) *Anderson* v. *Weston*, 6 Bing. N. C. 296, 301; *Sinclair* v. *Baggaley*, 4 M. & W. 312; *Gibson* v. *King*, Car. & M. 458; *Wright* v. *Lainson*, 2 M. & W. 739; *Edwards* v. *Crook*, 4 Esp. 39.

(*r*) *Kufh* v. *West*, 3 Esp. 54; *Warren* v. *Warren*, 1 C. M. & R. 250; *Stocken* v. *Collin*, 7 M. & W. 515.

(*s*) *Dunlop* v. *Higgins*, 1 Ho. Lo. Cas. 381.

(*t*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216, diss. Bramwell, L. J.

(*u*) *British American Telegraph Co.* v. *Colson*, L. R. 6 Ex. 108.

(*x*) See 6 & 7 Vict. c. 18, ss. 100 & 101; 28 Vict. c. 36, s. 9, &c.

[1] The American cases are in conflict. Callan *v.* Gaylord, 3 Watts, 321; Russell *v.* Buckley, 4 R. I. 525; Starr *v.* Torrey, 22 N. J. L. 190; Plath *v.* Ins. Co., 23 Minn. 479, acc. Tanner *v.* Hughes, 53 Pa. St. 289; Bank of Bellefonte *v.* McManigle, 69 Pa. St. 156, *contra*.

it is not (*y*). Presumptions of this kind are also made from the course of business in private offices; such as those of merchants (*z*), solicitors (*a*), &c.

§ 404. There are several other presumptions drawn from the usages of trade. Thus where a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is presumed that they are interested in equal moieties (*b*). So where a factor in this country buys or sells in his own name for a foreign principal, the right to sue, and the liability to be sued on the contract, are presumed to be exclusively in the factor, and not in the principal (*c*). So bills of exchange and promissory notes are presumed to have been given for consideration (*d*). And a bill of exchange, in the absence of proof to the contrary, is presumed to have been accepted within a reasonable time after its date, and before it came to maturity (*e*).

Sub-Section VII.

PRESUMPTION OF THE CONTINUANCE OF THINGS IN THE STATE IN WHICH THEY HAVE ONCE EXISTED.

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§ 405. It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either

(*y*) See 19 & 20 Vict. c. 47, ss. 53–54; 25 & 26 Vict. c. 89, ss. 62, 63, &c.

(*z*) *Hetherington* v. *Kemp*, 4 Camp. 193; *Toosey* v. *Williams*, 1 Mood. & M. 129; *Hawkes* v. *Salter*, 4 Bing. 715; *Pritt* v. *Fairclough*, 3 Camp. 305; *Hagedorn* v. *Reid*, *Id.* 379.

(*a*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 890.

(*b*) *Farrar* v. *Beswick*, 1 Moo. & R. 527, per Parke, B.

(*c*) Russell on Merc. Agency, 2nd Ed. 200, 233.

(*d*) Byles on Bills, 2 and 108, 8th Ed.

(*e*) *Roberts* v. *Bethell*, 12 C. B. 778. For other instances see *Carter* v. *Abbott*, 1 B. & C. 444; *Houghton* v. *Gilbart*, 7 C. & P. 701; *Leuckhart* v. *Cooper*, 7 C. & P. 119; *Cunningham* v. *Fonblanque*, 6 C. & P. 44.

direct or circumstantial.[1] Thus, where seisin of an estate has been shown, its continuance will be presumed (*f*); as also will that of a parochial settlement (*g*), of the authority of an agent (*h*), &c. And there are several instances to be found in the books, where this presumption has been held stronger than the presumption of innocence, or than presumptions derived from the course of nature. Thus, on an indictment for libelling a man in his capacity of public officer, on proof of the prosecutor having held the office previous to the publication of the libel, his continuing to do so was presumed (*i*). And it is said that where adultery had been proved, its continuance will be presumed while the parties live under the same roof (*k*). So although the law in general presumes against insanity, yet where the fact of insanity has been shown, its continuance will be presumed; and the proof of a subsequent lucid interval lies on the party who asserts it (*l*).[2]

§ 406. There are two particular cases which will require special consideration; namely, the presumption of the continuance of debts, obligations, &c., until discharged or otherwise extinguished; and the presumption of the continuance of human life. With respect to the former of these, a debt once proved to have existed, is presumed to continue unless payment, or some other discharge, be either proved, or established by circumstances (*m*). A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it (*n*); but a receipt under hand alone (*o*), or a verbal admission of payment (*p*), is in general only primâ facie evidence of it, and may be rebutted. Of the presumptive proofs of payment, the most obvious is that no demand has been made for a considerable time; and previous to the 3 & 4 Will. 4, c. 42, s. 3 (*q*), the courts had, by analogy to the Statute of

(*f*) *Wrotesley* v. *Adams*, Plowd. 193; *Smith* v. *Stapleton*, *Id.* 431; *Cockman* v. *Farrer*, T. Jones, 181.

(*g*) *R.* v. *Tanner*, 1 Esp. 304.

(*h*) See *Smout* v. *Ilbery*, 10 M. & W. 1.

(*i*) *R.* v. *Budd*, 5 Esp. 230.

(*k*) *Turton* v. *Turton*, 3 Hagg. N. R. 350.

(*l*) See *Banks* v. *Goodfellow*, L. Rep., 5 Q. B. 549, 570; Butl. Co. Litt. 246 b, n. (1); Gresl. Ev. in Eq. 368; *Att.-Gen.* v. *Parnther*, 3 Bro. C. C. 441; *White* v. *Wilson*, 13 Ves. 88.

(*m*) *Jackson* v. *Irvin*, 2 Camp. 50. Also in the Roman law, Cod. lib. 4, tit. 19, l. 1.

(*n*) Gilb. Evid. 158, 4th Ed.

(*o*) 1 Greenl. Ev. §§ 212 and 305, 7th Ed.

(*p*) Tayl. Ev. §§ 171 and 788, 4th Ed.

(*q*) Which enacts, that all actions for

[1] For American law, see § 296, n. 1, B. V. (*c*), *supra*, at p. 308. Wilkins *v.* Earle, 44 N. Y. 172; Farr *v.* Payne, 40 Vt. 615; Plank Road Co. *v.* Webb, 27 Ala. 618; Brown *v.* King, 5 Metc. 173, acc.

[2] The American cases adopt the same view. Saxon *v.* Whitaker, 30 Ala. 237; Breed *v.* Pratt, 18 Pick. 115; Ballew *v.* Clark, 2 Ired. (N. C.) L. 23; Titlow *v.* Titlow, 54 Pa. St. 216; Ripley *v.* Babcock, 13 Wis. 425, acc.

Limitations, established the artificial presumption that where payment of a bond or other specialty was not demanded for twenty years, and there was no proof of payment of interest, or any other circumstance to show that it was still in force, payment or release ought to be presumed (*r*).[1] Thus, in *Colsell* v. *Budd* (*s*), it was laid down by Lord Ellenborough that "after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years, or a less time coupled with some circumstance to strengthen the presumption." So the fact of payment may be presumed from any other circumstance which renders that fact probable (*t*); as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it (*u*). So where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid; for it is likely that he would take the debt of longest standing first (*x*). So it is said that where there is a competition of evidence on the question whether a security has or has not been satisfied by payment, the possession of the uncancelled security by the claimant ought to turn the scale in his favour, since in the ordinary course of dealing the security is given up to the party who pays it (*y*). And where land is conveyed to trustees in trust to pay debts, with remainder over, payment of the debts may be presumed from long possession by the remainderman, joined with other circumstances (*z*).

Release as well as payment may be inferred from circumstances (*a*).

§ 407. On the same principle, although a revocation or surrender will not be presumed (*b*), it may be inferred from circumstances. In *Doe* d. *Brandon* v. *Calvert* (*c*), where, in answer to an ejectment, the defendant set up a mortgage term made to a stranger eighteen

debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognisance, shall be commenced within twenty years after the cause of action, but not after.

(*r*) *Oswald* v. *Legh*, 1 T. R. 270; *Washington* v. *Brymer*, Peake's Ev., App. xxv.

(*s*) 1 Camp. 27. See *Oswald* v. *Legh*, 1 T. R. 270.

(*t*) 3 Stark. Ev. 823, 3rd Ed. See *Cooper* v. *Turner*, 2 Stark. Ev. 497; *Lucas* v. *Novisilienski*, 1 Esp. 296; *Sellen* v. *Norman*, 4 C. & P. 80; *Pfiel* v. *Vanbatenberg*, 2 Camp. 439.

(*u*) *Colsell* v. *Budd*, 1 Camp. 27. See Dig. lib. 22, tit. 3, l. 26, referred to *ante*, § 320.

(*x*) Gilb. Ev. 157, 4th Ed.

(*y*) Per Lord Ellenborough, *Brembridge* v. *Osborn*, 1 Stark. 374; and see Dig. lib. 22, tit. 3, l. 24; and Mascard. de Prob. Concl. 477.

(*z*) *Anon.*, Vin. Abr. Ev., Q. a. pl. 7.

(*a*) *Washington* v. *Brymer*, Peake's Ev. App. xxv.; *Pickering* v. *Lord Stamford*, 2 Ves. Jun. 583; *Reeves* v. *Brymer*, 6 *Id.* 516; *Motz* v. *Moreau*, 13 Moo. P. C. C. 376.

(*b*) *Moreton* v. *Horton*, 2 Keb. 483.

(*c*) 5 Taunt. 170.

[1] For American cases to same effect, see Jackson *v.* Wood, 12 Johns. R. 242; Bird *v.* Inslee, 23 N. J. Eq. 363; Reed *v.* Reed, 46 Pa. St. 239, 242; Hale *v.* Pack's Executors, 10 W. Va. 145, Jarvis *v.* Albro, 67 Me 310.

years before, and neither accounted for his possession of it, nor proved any payment of interest under the mortgage; and the judge advised the jury to presume a surrender of the mortgage term, — the verdict was set aside by the court; and Mansfield, C. J., said: "There is no circumstance here to lead to the supposition that the deed was surrendered, except the eighteen years' time; if the deed had been assigned or surrendered, the instrument whereby it had been assigned or surrendered ought to be in the possession of the plaintiff. No reason is assigned to account why it should not be there; the question is therefore whether, from the circumstance of the eighteen years only, a surrender can be presumed. I have never known any case in which a shorter time than twenty years has been held sufficient to ground the presumption of a surrender; and that is often too short a time, for many times receipts and documents may be lost. But it is enough to say, that twenty years is the time prescribed by Act of Parliament as a bar to an ejectment, by analogy to which the doctrine of presumption has gone; and we might as well say a presumption might be raised by five years in assumpsit, or three years in trespass, as eighteen years in ejectment."

§ 408. We next proceed to the presumptions of the continuance of human life. There is certainly, in the English law, no *præsumptio juris* relative to the continuance of life, in the abstract. The death of any party once shown to have been alive is matter of fact to be determined by a jury; and as the presumption is in favour of the continuance of life, the onus of proving the death lies on the party who asserts it (*e*).

§ 409. The fact of death may, however, be proved by presumptive as well as by direct evidence (*f*).[1] When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of (*g*). And the same rule holds generally with respect to persons who are absent from their usual places of resort, and of whom no account can be given (*h*). This is incorrectly spoken of

(*e*) *Smartle* v. *Penhallow*, 2 Lord Raym. 999; *Throgmorton* v. *Walton*, 2 Ro. 461; *Wilson* v. *Hodges*, 2 East, 312.

(*f*) *Thorne* v. *Rolff*, Dyer, 185 a, pl. 65; Anders. 20, pl. 42; *Webster* v. *Birchmore*, 13 Ves. 362.

(*g*) Per Lord Ellenborough, *Doe* d. *George* v. *Jesson*, 6 East, 80, 84; *Doe* d. *Banning* v. *Griffin*, 15 East, 293; *Lee* v. *Willock*, 6 Ves. 605; *Rust* v. *Baker*, 8 Sim. 443; *Ommaney* v. *Stilwell*, 23 Beav. 332; *In the goods of How*, 1 Swab. & T. 53.

(*h*) *Doe* d. *Lloyd* v. *Deakin*, 4 B. & A. 433. See *Doe* d. *George* v. *Jesson*, *supra*; *Bailey* v. *Hammond*, 7 Ves. 590; *Doe* d. *France* v. *Andrews*, 15 Q. B. 756.

[1] For an American case to same effect, see Ruloff *v.* People, 18 N. Y. 179.

in some books as a presumption of *law* (*i*); but it is in truth a mixed presumption, said to have been adopted by analogy to the statutes 1 Jac. 1, c. 11, s. 2 (*k*), and 19 Car. 2, c. 6, s. 2, — the former of which exempts from the penalties of bigamy any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or shall be absent the one from the other for seven years together, in any parts within the King's dominions, the one of them not knowing the other to be living within that time; and the latter of which enacts, that persons in leases for lives, who shall remain beyond the seas, or elsewhere absent themselves in the realm for more than seven years, shall thereupon, in the absence of proof to the contrary, be deemed naturally dead (*l*). But where a party has been absent for seven years without having been heard of, the only presumption arising is that he is dead; there is no presumption as to when, in the seven years, he died (*l'*).[1] And if it be sought to establish the precise time of such person's death, this must be done affirmatively, by evidence of some sort beyond the mere fact that seven years have elapsed since such person was last heard of (*m*). Cases in which this presumption has come in conflict with the presumption of innocence have been already considered (*n*); and a jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur (*o*).[2]

§ 410. As connected with the subject of the continuance of human life, it remains to notice one which has embarrassed more or less the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves,

(*i*) See the judgment in *Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894.

(*k*) This statute was repealed by 9 Geo 4, c. 31, s. 22, which exempts from the penalties of bigamy "any person whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute was in its turn repealed by 24 & 25 Vict. c. 95, and re enacted by 24 & 25 Vict. c. 100, s. 57.

(*l*) 4 Burge's Col. Law, 10, 11; Shelford's Real Property Statutes, 176, 177, 4th Ed. There are traces to be found in the books of this sort of presumption before the statutes (see *Thorn* v. *Rolff*, Dyer, 185 a, pl. 65; and F. N. B. 196 L.), which might possibly have been adopted by analogy to the pre existing presumption, instead of its being copied from them.

(*l'*) *Rhodes* v. *Rhodes*, 36 Ch. D. 586, 56 L. J. Ch. 825.

(*m*) *Doe* d. *Knight* v. *Nepean*, 5 B. & Ad. 86; affirmed on error, 2 M. & W. 894. And see *In re Lewes' Trusts*, L. Rep., 6 Ch. App. 356; *Reg.* v. *Lumley*, L. Rep, 1 C. C. 196; *Re Phené*, L. Rep., 5 Ch. App. 139.

(*n*) *Supra*, sect. 1, sub-sect. 3, § 334.

(*o*) 1 Greenl. Ev. § 41, 7th Ed.

[1] The American cases are in conflict; see, for example, Spencer *v.* Roper, 13 Ired. L. 333; Hancock *v.* Ins. Co., 62 Mo. 26, acc. Clarke *v.* Canfield, 15 N. J. Eq. 119; Whiting *v.* Nicholl, 46 Ill. 230, 241, *contra*.

[2] So of the American cases. Smith *v.* Knowlton, 11 N. H. 191, 197; Stouvenel *v.* Stephens, 2 Daly (N. Y.), 319; White *v.* Mann, 26 Me. 361; Gibbes *v.* Vincent, 11 Rich. (S. C.) 323; Spears *v.* Burton, 31 Miss. 547, acc.

where several persons, generally of the same family, have perished by a common calamity, — such as shipwreck, earthquake, conflagration, railway accident, or battle; and where the priority in point of time, of the death of one over the rest, exercises an influence on the rights of third parties. The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a general principle (subject, however, to exceptions) that, where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but if above that age, the rule was reversed; while in the case of husband and wife, the presumption seems to have been in favour of the survivorship of the husband (*p*). The French lawyers also, both ancient and modern, have taken much pains on this subject (*q*). All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now even assuming that, primâ facie, a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position is at best no more than a general rule; for not only in particular instances would the superior strength or health of the party supposed to be the weaker reverse all, but the rules rest on the hypothesis that both parties were in exactly the same situation with reference to the impending danger; whereas it is obvious that their respective situations with reference to it must usually be unascertainable in the fury of a battle, or amidst the horrors of an earthquake or a shipwreck. And the moral condition of the parties must not be overlooked: the brave survive the fearful and the nervous. Add to this, that according to some modern physiologists, in some kinds of death the strongest perish first (*r*). However that may be, in opening the door to this class of questions, the lawyers of Rome and France

(*p*) 1 Greenl. Ev. § 29, 7th Ed.; Dig. lib. 34, tit. 5.

(*q*) For the views of the old French lawyers, see Burge's Colonial Law, vol. 4, ch. 1, sect. 1; and for the law of France at the present day, Code Civil, liv. 3, tit. 1, ch. 1, Des Successions, §§ 720, 721, 722.

The civil code of Louisiana in a case of this kind adopts the rule of the French code; namely, that under the age of fifteen, the presumption shall be that the oldest survived, while of those above the age of sixty, the youngest shall be presumed to have survived. Between these ages, if of different sexes, the male is presumed, and if of the same sex, the younger is presumed to be the survivor. The courts of common law, however, have generally disinclined from adopting this presumption. *Id.*, citing *Coye* v. *Leach*, 8 Metc. (Mass.) 371.

(*r*) See Beck's Med. Jur. p. 397, 7th Ed., where is related an incident furnished by a modern traveller, who, in giving an account of a caravan being in want of water in a Nubian desert, says that "the youngest slaves bore the thirst better than the rest; and while the grown up boys all died, the children reached Egypt in safety." The same author adds, "as to *habit* and variety of constitution, all such that have a tendency to affections of the head and lungs should be deemed the first victims, in case the causes of death are of a description to affect these."

lost sight of the salutary maxim, "Nimia subtilitas in jure reprobatur" (*s*). The English law has judged more wisely; for, notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognises no *artificial* presumption in cases of this nature, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight; *i. e.*, as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof (*t*).[1] When therefore a party on whom the onus lies of proving the survivorship of one individual over another has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this that the law presumes both to have perished at the same moment: this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment. The law, as stated above, has been fully established in the case of *Underwood* v. *Wing* (*u*), — the judgment in which was affirmed by Lord Chancellor Cranworth assisted by Wightman, J., and Martin, B. (*x*); and finally by the House of Lords, in *Wing* v. *Angrave* (*y*).[2]

(*s*) 4 Co. 5 b; 5 Co. 121 a; 3 Bulst. 65.

(*t*) One of the best-known cases on this subject is that of General Stanwix and his daughter. *R.* v. *Dr. Hay*, 1 W. Bl. 640. The celebrated Mr. Fearne composed two ingenious arguments, one in favour of each of the claimants. See his Works. There is, however, a prior case of *Hitchcock* v. *Beardsley*, West. Rep. t. Hardw. 445; and an old case of *Broughton* v. *Randall*, Cro. El. 503, where a father and son were hanged together in one cart, and the son was presumed to have survived in consequence of his appearing to struggle longer, and some other circumstances. The cases of late years have become comparatively numerous. See *Taylor* v. *Diplock*, 2 Phillim. 261; *Wright* v. *Netherwood* (or *Samuda*), 2 Phillim. 266, n. (*c*); *Mason* v. *Mason*, 1 Meriv. 308; *In the goods of Selwyn*, 1 Hagg. N. S. 92; 3 *Id.* 748; *In the goods of Murray*, 1 Curteis, 596; *Sillick* v. *Booth*, 1 Y. & C. C. C. 117; *Durrant* v. *Friend*, 5 De Gex & S. 343; *Underwood* v. *Wing*, 4 De G., M. & G. 633; 1 Jur. N. S. 169, &c.

(*u*) Per Romilly, M. R., 19 Beav. 459.

(*x*) 4 De G., M. & G. 633; 1 Jur. N. S. 169.

(*y*) 8 H. L. C. 183.

[1] An apt illustration of a presumption of fact not sufficiently strong to be made a presumption of law. Conf. § 296, n. 1, A. (*b*), *supra*.

[2] So of American cases. Mochring *v.* Mitchell, 1 Barb. Ch. (N. Y.) 264; Kans. Pac. R. R. *v.* Miller, 2 Col. T. 442, 464; Smith *v.* Croom, 7 Fla. 81; Robinson *v.* Gallier, 2 Wood (C. Ct.), 178; Coye *v.* Leach, 8 Metc. 371, acc.

Sub-Section VIII.

PRESUMPTIONS IN DISFAVOUR OF A SPOLIATOR.

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§ 411. Another very important and rather favourite maxim is "Omnia præsumuntur contra spoliatorem" (*z*), or "Omnia præsumuntur in odium spoliatoris" (*a*), — a maxim resting partly on natural equity, but much strengthened by the artificial policy of law.[1] The leading case on this subject is that of *Armory* v. *Delamirie* (*b*), where a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretence of weighing it, took out the stones, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket the measure of their damages. In the great case of *Annesley* v. *The Earl of Anglesea* (*c*), the circumstances which pressed most against the defendant were, that he had caused the plaintiff, who claimed the title and family estate as heir, to be kidnapped and sent to sea, and afterwards endeavoured to take away his life on a false charge of murder, — facts which, one of the judges said, spoke more strongly in proof of the plaintiff's case than a thousand witnesses. So, as has been well said, if it be shown that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one (*d*). And in cases of highway robbery the law, in odium spoliatoris, will presume fear whenever property is taken with

(*z*) 2 Ev. Poth. 336; 1 Stark. Ev. 564, 3rd Ed.; 10 H. L. Ca. 591.

(*a*) Lofft, M. 389.

(*b*) 1 Stra. 505; 1 Sm. L. C. And see *Mortimer* v. *Craddock*, 7 Jur. 45.

(*c*) 17 How. St. Tr. 1140, 1430, per Mounteney, B.

(*d*) Per Cockburn, L C. J., *Moriarty* v. *London, Chatham, and Dover Railway Co.*, L. Rep., 5 Q. B. 314, 319.

[1] The American law is the same. Lucas *v.* Brooks, 23 La. An. 117; Downing *v.* Plate, 90 Ill. 268; Thompson *v.* Thompson, 9 Ind. 323; Revel *v.* State, 26 Ga. 275; Winchell *v.* Edwards, 57 Ill. 41.

such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with his property from an apprehension of personal danger (*e*); so that, even where the prosecutor sought out the robber, and submitted to be robbed by him for the purpose of bringing him to justice, this was held to be robbery on the part of the accused (*f*). In the Roman law, although the general rule was that money paid was presumed to be in discharge of a debt, yet where a man who was sued for a debt denied having received the money, proof that he had in point of fact received it, turned on him the burden of showing that it was in payment of a debt (*g*). The application of the maxim to international law will be considered in another place (*h*).

§ 412. But the most usual application of this principle is where there has been any forensic malpractice, — by eloigning, suppressing, defacing, destroying, or fabricating documents, or other instruments of evidence, or introducing into legal proceedings any species of the crimen falsi. This not only raises a presumption that the documents or evidence eloigned, suppressed, &c., would, if produced, militate against the party eloigning, suppressing, &c., but procures more ready admission to the evidence of the opposite side (*i*).[1] "If," says L. C. J. Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" (*k*). This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong; and several instances of its application are to be found in the books. Thus, in the case of *R.* v. *The Countess of Arundel* (*l*), where the crown was entitled at law to certain land, by reason

(*e*) 2 East, P. C. 711.

(*f*) *Norden's case*, cited Foster, C. L. 129.

(*g*) Dig. lib. 22, tit. 3, l. 25.

(*h*) *Infrà*, sub-sect. 9.

(*i*) Ph. & Am. Ev. 458. See *Roe* d. *Haldane* v. *Harvey*, 4 Burr. 2484.

(*k*) *Anon.*, 1 L. Raym. 731.

(*l*) Hob. 109. According to that report, there was only a vehement suspicion that the deeds had been suppressed; but in *Cowper* v. *Earl Cowper*, 2 P. Wms. 749, Sir Jos. Jekyll, M. R., says, that he had caused the register book to be examined, from which it appeared that the deeds had been proved to have been extant and duly executed. For other instances of the manner in which the spoliation of documents is dealt with by courts of equity, see the cases there cited, and also *Dalston* v. *Coatsworth*, 1 P. W. 731; *White* v. *Lady Lincoln*, 8 Ves. 363; *Blanchet* v. *Foster*, 2 Ves. Sen. 264; and *The Atty-Gen.* v. *The Dean of Windsor*, 24 Beav. 679.

[1] To the same effect are the following American cases: The Tillie, 7 Benedict (U. S.), 382; Hunter *v.* Lander, 8 L. J. N. S. 17; Briggs *v.* McBride, 1 P. & B. 663; Crescent Ice Co. *v.* Ermann, 36 La. An. 341; State *v.* Chamberlain, 89 Mo. 129; R. R. *v.* Gray, 77 Ga. 440; Ins. Co. *v.* Moog, 78 Ala. 284; Benjamin *v.* Ellinger, 80 Ky. 472, acc. So also withholding important evidence which it is within the power of the party to produce, raises a presumption that the evidence withheld would operate to the disadvantage of such party. Durgin *v.* Danville, 47 Vt. 95, 105; Frick *v.* Barbour, 64 Pa. St. 120; Miller *v.* Jones, 32 Ark. 337; Wallace *v.* Harris, 32 Mich. 380, 394; McDonough *v.* O'Niel, 113 Mass. 92; Atty-Gen. *v.* Halliday, 26 Q. B. U. C. 397; Lowell *v.* Todd, 15 C. P. U. C. 305; Merwin *v.* Ward, 15 Conn. 377, acc. Conf. § 87, n. 1, *supra*.

of an attainder for high treason, a suit in equity to recover the lands was commenced by the Attorney-General against the defendants; and on its being shown that the deeds whereby the estate came to the party attainted were not extant, but were very strongly suspected to have been suppressed and withheld by some one under whom the defendant claimed, a decree was made that the crown should hold and enjoy the land till the defendant could produce the deeds, and the court thereupon take further consideration and order. So it would seem that if the question were whether a former will had been revoked by a will made subsequently, the contents of which were said to differ from those of the former will, — although, the latter will not being produced, it did not appear wherein the difference consisted, — evidence of spoliation on the part of the claimant under the former will would lay a fair foundation for the presumption that it had been revoked by the latter will (*m*). So if a man refuses, after notice, to produce an agreement, it will be presumed to have been properly stamped (*n*); and it has been held at nisi prius that where one of the parties to a suit has fraudulently obtained a document from a witness whose property it is, and who is called on to produce it under a subpœna duces tecum, secondary evidence of the contents of the document may be given without notice to produce the original (*o*).[1]

413. It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favourable reception for the evidence of his opponent; but that it has the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice (*p*). "Qui semel malus, semper præsumitur esse malus eodem genere" (*q*). In the case of *Doe* d. *Beanland* v. *Hirst* (*r*), Bayley, J., is reported to have told the jury that they were to consider the circumstance of the erasure in a certain deed, observing that a man who was capable of making an alteration in one deed might be capable of suppressing another, if within his power. And the pre-

(*m*) See per Lord Mansfield, *Harwood* v. *Goodright*, Cowp. 87, 91.

(*n*) *Crisp* v. *Anderson*, 1 Stark. 35.

(*o*) *Leeds* v. *Cook*, 4 Esp. 256.

(*p*) Ph. & Am. Ev. 458.

(*q*) Cro. Car. 317. The text of the canon law went farther, laying it down, "Semel malus, semper præsumitur esse malus." Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 8. But the commentators on that law seem disposed to restrict its effect to misconduct ejusdem generis. See Gibert, Corp. Jur. Can. Proleg. Pars Post. tit. 7, cap. 2, § 2, n. 20; also Struvius, Synt. Jur. Civ. Exercit. 28, § 18, n. (ζ), by Müller, and *infrà*, sect. 3, sub-sect. 1.

(*r*) 11 Price, 488.

[1] See American case to same effect, — Grimes *v.* Kimball, 3 All. 518. See also Bott *v.* Wood, 56 Miss. 136.

sumption arising from the fabrication or corruption of instruments of evidence is even stronger than that arising from the suppression or destruction of them (*s*).

§ 414. However salutary, and in general equitable, the maxim, "Omnia præsumuntur contra spoliatorem," must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far. "The mere non-production of written evidence," says Sir W. D. Evans (*t*), "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." So in *Barker* v. *Ray* (*u*), Lord Eldon said: "This court has a peculiar jurisdiction in cases of spoliation. . . . The jurisdiction of the court in matters of spoliation has gone a long way; indeed, it has gone to such a length that if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length." Even when the positive fabrication of evidence is proved against a party, tribunals whose object is the ascertaining of truth will consider the nature of the case, and the temptation which might have led to fabrication. Is there anything impossible in the suggestion, is it even unlikely, that in many cases the fabrication of evidence has been resorted to under the apprehension, perhaps the certain knowledge, that similar malpractice will be exercised by the other side (*x*)? Suppose a man is sued on a bond which he knows to be a forgery, but feels that it is altogether out of his power to prove it so. "Forge a release," or "Bribe a witness to prove payment" (*y*), are suggestions too obvious not to have been occasionally acted on.

§ 415. Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases,

(*s*) 1 Stark. Ev. 564, 3rd Ed.

(*t*) 2 Ev. Poth. 337.

(*u*) 2 Russ. 72, 73.

(*x*) 3 Benth. Jud. Ev. 168.

(*y*) *Id.* "One of the greatest and most difficult points in the Douglas cause," observes Sir W. D. Evans, "arose from Sir John Stewart having fabricated four letters, as received from La Marre, the surgeon,—a conduct certainly very suspicious, and calculated to induce a strong presumption against the general veracity of his account. I believe the true conclusion from all the circumstances in that cause to be that which was drawn by the House of Lords in support of the filiation; but it is impossible for great doubt not to hang upon a case affected by such a circumstance." 2 Ev. Poth. 337, n. (*a*).

where life or liberty are at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled. Nations and ages differ in the tone of moral feeling diffused through society, and in their reverence for the sacredness of an oath; men differ in strength of conscientious principle, as well as in courage; and tribunals differ in ability and impartiality and in the quantity of evidence which they exact for condemnation. Undoubtedly the suppression or fabrication of evidence by a party accused of a crime is always a *circumstance*, frequently a most powerful one, to prove his guilt. But many instances have occurred of innocent persons — alarmed at a body of evidence against them which, although false or inconclusive, they felt themselves unable to refute — having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory testimony (*z*). Sir Edward Coke relates a now well-known, but not on that account less remarkable or striking instance of this (*a*). An uncle had the bringing up of his niece, who was entitled to some landed property under her father's will, of which she would become possessed at the age of sixteen, and to which the uncle was next heir. When she was about eight or nine years old, he was one day correcting her for some offence, when she was heard to say, "Oh, good uncle, kill me not!" After this time the child could not be heard of, though much inquiry was made after her; and the uncle, being committed to jail on suspicion of her murder, was admonished by the justices of assize to find out the child against the next assizes. Unable to do this, he dressed up another child to represent her; but the falsehood being detected, he was convicted and executed for the supposed murder. It afterwards appeared, however, that on being beaten by her uncle, the niece had run away into an adjoining county, where she remained until the age of sixteen, when she returned to claim her property. "Which case," he adds, "we have reported for a double caveat: first, to judges, that they in case of life judge not too hastily upon bare presumption; and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he, offending God (the author of truth), overthrow himself, as the uncle did." A case is also related where, in a large company, a valuable trinket belonging to one of the party was suddenly missed. On the proposal of one of the company, all agreed to be searched, except one, who, by an obstinate refusal, drew

(*z*) 1 Stark. Ev. 565, 3rd Ed.; Ph. & Am. Ev. 467. Innocent persons have occasionally endeavoured to defend themselves by setting up false alibis; and cases have probably occurred where the accused, though innocent, could not avail himself of his real defence without criminating others whom he is anxious not to injure, or even criminating himself with respect to other transactions.

(*a*) 3 Inst. ch. 104, p. 232; cited also 2 Hale, P. C. 290; 2 Ev. Poth. 338; Wills, Circ. Ev. 82, 3rd Ed.

down on himself strong suspicion. He, however, succeeded in obtaining a private audience of the master of the house; and on his pockets being turned inside out, there was discovered, instead of the trinket sought, a portion of eatables which he had taken to carry home to his wife, who had no means of procuring food (*b*).

Sub-Section IX.

PRESUMPTIONS IN INTERNATIONAL LAW.

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§ 416. We propose now to consider certain presumptions to be found in international law.

§ 417. The public international law, as is well known, is adopted by the common law, and is held to be part of the law of the land (*c*), "In republicâ maximè conservanda sunt jura belli" (*d*).

§ 418. Where the subject of one state is also the independent sovereign of another, he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign (*e*). And it seems that in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince (*f*).

§ 419. The principle of presuming in disfavour of a spoliator (*g*) is recognised in international law (*h*), especially in those cases where papers have been spoliated by a captured party (*i*),[1] and where

(*b*) 3 Benth. Jud. Ev. 88–89.

(*c*) 4 Blackst. Comm. 67.

(*d*) 2 Inst. 58.

(*e*) *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 1; *Wadsworth* v. *The Queen of Spain*, 17 Q. B. 171; *De Haber* v. *The Queen of Portugal*, *Id.* 196.

(*f*) *The Duke of Brunswick* v. *The King of Hanover*, 6 Beav. 57, 58.

(*g*) See this subject generally, *supra*, sub-sect. 8.

(*h*) 1 Greenl. Ev. § 31, 7th Ed.

(*i*) *The Hunter*, 1 Dods. Adm. Rep. 480; *The Johanna Emilie*, 18 Jur. 703.

[1] For a supporting American authority, see The Pizarro, 2 Wheat. 227, 242, n. (*e*).

neutral vessels are found carrying despatches from one part of the dominions of a belligerent power to another (*k*).

§ 420. With respect to private international law, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests" (*l*).[1] So, says Professor Greenleaf, "A spirit of *comity* and a disposition to friendly intercourse are presumed to exist among nations as well as among individuals" (*m*).

§ 421. There are other presumptions to be found in this branch of jurisprudence. Thus, the place of a person's birth is considered as his domicil, if it is at the time of his birth the domicil of his parents (*n*).[2] But a more important rule is, that the place where a person lives must be taken, primâ facie, to be his domicil, until other facts establish the contrary (*o*).[3] Where the family of a married man resides is generally to be deemed his domicil (*p*); and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges (*q*).[4] And it is said to be a principle, that where the place of domicil is fixed or determined by positive facts, presumptions from mere circumstances will not prevail against those facts (*r*).[5] This does not mean that presumptive evidence is inadmissible to prove domicil; and, indeed, it amounts to little more than saying that the weaker evidence shall not be allowed to prevail against the stronger.

(*k*) *The Atalanta*, 6 Robins. Adm. R. 440.
(*l*) Story, Confl. of Laws, § 38, 5th Ed.
(*m*) 1 Greenl. Ev. § 43, 7th Ed.
(*n*) Story, Confl. of Laws, § 46, 5th Ed.
(*o*) *Id.*; *Bruce* v. *Bruce*, 2 B. & P. 229, 230, n. (*a*); *Bempde* v. *Johnstone*, 3 Ves. Jun. 198; *Stanley* v. *Bernes*, 3 Hagg. N. R. 437.
(*p*) Story, Confl. of Laws, § 46, 5th Ed.
(*q*) *Id.* § 47, 5th Ed.
(*r*) *Id.*

[1] This view is supported by the American authorities. Bank of Augusta *v.* Earle, 13 Pet. 519, 589.

[2] In the United States, as every man is considered to have at all times a domicil, either of origin, compulsion, or choice, it has been held that this domicil of origin revives when one domicil of choice is abandoned and until a new one is gained. Reed's Appeal, 71 Pa. St. 378. See *contra*, First Nat. Bank of New Haven *v.* Balcom, 35 Conn. 351. See also Littlefield *v.* Brooks, 50 Me. 475; Desmare *v.* U. S., 93 U. S. 605; Mitchell *v.* U. S., 21 Wall. 350; Rixford *v.* Miller, 49 Vt. 319; Greenfield *v.* Camden, 74 Me. 56.

[3] See, for American law, First Nat. Bank of New Haven *v.* Balcom, 35 Conn. 351.

[4] An American case is *contra*. Catlin *v.* Gladding, 4 Mason, 308.

[5] So in the United States. Anderson *v.* Anderson, 42 Vt. 350; Hallet *v.* Bassett, 100 Mass. 167, 171; Easterly *v.* Goodwin, 35 Conn. 279, acc.

§ 422. It is also a principle of international law that, generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country (*s*); for, in the latter case, the law of the place of performance is to govern (*t*), because such may well be presumed to have been the intention of the parties (*u*).[1] So a foreign marriage will be presumed to have been celebrated with the solemnities required by the law of the place where it is celebrated (*x*). And the general presumptions against crime, fraud, covin, immorality, &c., are applicable to acts done abroad.

Sub-Section X.

PRESUMPTIONS IN MARITIME LAW.

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§ 423. Among the most important presumptions in maritime law are those relating to seaworthiness.

Every ship insured on a *voyage* policy sails under an implied warranty that she is seaworthy. It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable (*y*).[2] But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured; and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage (*z*).[3]

(*s*) Per Lord Mansfield, *Robinson* v. *Bland*, 1 W. Bl. 256, 258, 259.

(*t*) Story, Confl. of Laws, § 242 (1), 280–282.

(*u*) *Id.* § 76.

(*x*) *R.* v. *The Inhabitants of Brampton*, 10 East, 282, 289, per Lord Ellenborough.

(*y*) Park, Ins. 332, 7th Ed.; Arn. Ins. 689, 690, 2nd Ed.; *Knill* v. *Hooper*, 2 H. & N. 277; *Douglas* v. *Scougall*, 4 Dow, 269.

(*z*) *Munro* v. *Vandam*, Park, Ins. 333, n. (*a*), 7th Ed.

[1] See also Whar. Conf. Laws, § 398 *et seq.*; Story, Conf. Laws, §§ 76, 242–248, 327.

[2] The American law is the same. Craig *v.* U. S. Ins. Co., 1 Pet. C. Ct. 410; Tidmarsh *v.* Washington, F. & M. Ins. Co., 4 Mason, C. Ct. 439, acc. But a mere deficiency or temporary fault in equipment is not so regarded. Deblois *v.* Ocean Ins. Co., 16 Pick. 303; Merch. Ins. Co. *v.* Clapp, 11 Pick. 56; U. S. *v.* Hunt, 2 Story, C. Ct. 120; M'Millan *v.* Union Ins. Co., Rice (S. C.) Law, 248.

[3] The American cases are in accord. Talcot *v.* Commerc. Ins. Co., 2 Johns. 124, 467; Cort *v.* Del. Ins. Co., 2 Wash. C. Ct. 375; Myers *v.* Gerard Ins. Co., 26 Pa. St. 192.

And this rule holds even though the ship encountered a violent storm, unless it can fairly be inferred that the damage resulted from the storm (*a*). The implied warranty of seaworthiness, however, does not extend to *time* policies (*b*).[1]

§ 424. Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it is to be presumed that she foundered at sea (*c*). There is no precise time for this presumption fixed, either by the common or general maritime law (*d*), although the laws of some countries have peculiar provisions on the subject (*e*); but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation.[2] In order, however, to raise this presumption, it must be distinctly shown that the ship left port, bound on her intended voyage (*f*).

Sub-Section XI.

MISCELLANEOUS PRESUMPTIONS.

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§ 425. We now propose to advert to some presumptions likely to be met with in practice, which have not been hitherto noticed.

§ 426. A large number of these relate to real estate, and are for the most part *quasi præsumptiones juris; i.e.*, presumptions which

(*a*) *Douglas* v. *Scougall*, 4 Dow, 269; *Watson* v. *Clark*, 1 Dow, 336; *Parker* v. *Potts*, 3 Dow, 23.

(*b*) *Gibson* v. *Small*, 4 Ho. Lo. Cas. 353; *Thompson* v. *Hopper*, 6 E. & B. 172, 937; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284.

(*c*) Park, Ins. 105, 7th Ed.; *Green* v. *Brown*, 2 Str. 1199; *Houstman* v. *Thornton*, Holt, N. P. C. 243.

(*d*) Park, Ins. 106, 7th Ed.; *Houstman* v. *Thornton*, Holt, N. P. C. 243, per Gibbs, C. J.

(*e*) Park, Ins. 107, 7th Ed.

(*f*) *Koster* v. *Innes*, R. & M. 333; *Cohen* v. *Hinckley*, 2 Camp. 51.

[1] There is a conflict between the American authorities. Jones *v.* Ins. Co., 2 Wall. Jr., 278, acc. Hoxie *v.* Pacific Ins. Co., 7 All. 211; Hoxie *v.* Home Ins. Co., 32 Conn. 21, *contra*. But where a policy is effected on a vessel at sea, there is at no time an implied warranty of seaworthiness. Capen *v.* Wash. Ins. Co., 12 Cush. 517; Macy *v.* Mut. Ins. Co., 12 Gray, 497.

[2] So in the United States. Brown *v.* Neilson, 1 Caines (N. Y.), 525; Gordon *v.* Bowne, 2 Johns. 150.

are almost as obligatory as presumptions of law, but which cannot be made without the intervention of a jury. Thus the soil of the sea-shore, between high and low water-mark, is presumed to belong to the crown (*g*);[1] and so is the soil at the bottom of a navigable tidal river (*h*).[2] So the shore of the sea or of a tidal river, between ordinary high and low water-mark, is presumed to be extra-parochial (*i*). Whether the soil of lakes primâ facie belongs to the owners of the lands or manors on either side, ad medium filum aquæ, or to the crown, seems a disputed point (*k*); and it is a point bare of authority, whether unoccupied islands within three miles of the shore belong to the crown or to the owner of the shore above high water-mark. Such islands, however, are within the territorial jurisdiction of the crown (*m*), and there seems to be little doubt that the crown has a right of property in them also (*m*). Where the river is not navigable, the bed is presumed to be the property of the owners on each side, ad medium filum aquæ (*n*).[3] The same principle holds in the case of a public highway, the soil of which is taken, primâ facie, to belong to the owners of the adjoining lands, usque ad medium filum viæ (*o*);[4] and it also applies to the case of a private road (*p*). But as this presumption is founded on the supposition that the road originally passed over the lands of adjoining owners, it seems that it does not apply to roads set out under

(*g*) *Blundell* v. *Catterall*, 5 B. & A. 268, 304, per Bayley, J. See *The Att.-Gen.* v. *Chambers*, 4 De G., M. & G. 206; 5 Jur. N. S. 745.

(*h*) *Malcolmson* v. *O'Dea*, 10 Ho. Lo. Cas. 593, 618.

(*i*) *Ipswich Dock Commissioners* v. *Overseers of St. Peter's, Ipswich*, 7 B. & S. 310; *Bridgwater Trustees* v. *Booth*, *Id.* 348; L. Rep., 2 Q. B. 4.

(*k*) *Marshall* v. *The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed in error, 6 B. & S. 570.

(*m*) See Territorial Waters Jurisdiction Act, 1878.

(*n*) *Carter* v. *Murcot*, 4 Burr. 2162; *R.* v. *The Inhabitants of Landulph*, 1 Moo. & R. 393; *Lord* v. *The Commissioners of Sidney*, 12 Moo. P. C. C. 473; *M'Cannon* v. *Sinclair*, 2 E. & E. 53.

(*o*) *Berry and Goodman's case*, 2 Leon. 148; *Grose* v. *West*, 7 Taunt. 39; *Anon.*, Lofft, 358; *Cooke* v. *Green*, 11 Price, 739; *Salisbury* (*Marquis of*) v. *The Great Northern Railway Company*, 5 Jur. N. S. 70; *Berridge* v. *Ward*, 10 C. B. N. S. 400; *R.* v. *The Strand Board of Works*, 4 B. & S. 526.

(*p*) *Holmes* v. *Bellingham*, 7 C. B. N. S. 329.

[1] For the American law on this subject, see *infra*, p. 383.

[2] For American law, see Pollard *v.* Hagan, 3 How. (U. S.) 212, acc.

[3] So of the American cases. Boston *v.* Richardson, 13 All. 146; Walton *v.* Tifft, 14 Barb. 216; Manuf. Co. *v.* Smith, 34 Conn. 462, acc. Whether the same is true of great rivers not tidal, is a point in dispute. That the rights of riparian ownership extend *ad medium filum*, see Berry *v.* Snyder, 3 Bush, 266; Jones *v.* Soulard, 24 How. 41; Arnold *v.* Elmore, 16 Wis. 509; Magnolia *v.* Marshall, 39 Miss. 109; Rice *v.* Ruddiman, 10 Mich. 125. But see, *contra*, People *v.* Canal Appraisers, 33 N. Y. 461; Haight *v.* Keokuk, 4 Clarke (Ia.), 199; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112.

[4] For the rule in America, see Harris *v.* Elliott, 10 Pet. 25, 53; Morrow *v.* Willard, 30 Vt. 118; Newhall *v.* Ireson, 8 Cush. 595; Cox *v.* Freedley, 33 Pa. St. 124.

enclosure acts (*q*), or to cases where the original dedication of the road can be shown by positive evidence (*r*). And in the case of a private road, it may be rebutted by proof of acts of ownership (*s*). Again, it seems to be a *præsumptio juris* that one part of a manor is not of a different nature from the rest (*t*). So the lord of a manor is, primâ facie, entitled to all the waste lands within the manor (*u*); but the presumption may be rebutted by circumstances (*x*). Strips of land adjoining a road are presumed to belong to the owner of the adjoining enclosed land, and not to the lord of the manor (*y*), although this presumption also may be rebutted (*z*); and is either done away, or considerably narrowed, by proof that those strips communicated with open commons, or larger portions of land (*a*). Where an enclosure is bounded by a bank and ditch, the land which constitutes the ditch is primâ facie part of the close, although it be on the outside of the bank (*b*). And in the case of party-walls where the quantity of land contributed by each owner is unknown, the common use of the wall is primâ facie evidence that it and the land on which it is built are the undivided property of both (*c*).

§ 427. Where the terms of the grant of a several fishery are unknown, the owner of the fishery may be presumed to be the owner of the soil (*d*); but where those terms appear, and are such as to convey an incorporeal hereditament only, the presumption is destroyed (*e*). And ownership of the soil is primâ facie evidence of a right of fishery (*f*). Proof of a carriage-way is presumptive evidence of a grant of a drift-way (*g*). Where rents of small amount have been paid to the lord of a manor for a long series of years, without any variation, the payment of them affords no evidence of title to the

(*q*) *R.* v. *The Inhabitants of Edmonton*, 1 M. & Rob. 24, 32; *R.* v. *Wright*, 3 B. & Ad. 681.

(*r*) *Headlam* v. *Headley*, Holt, N. P. C. 463.

(*s*) See *Holmes* v. *Bellingham*, 7 C. B. N. S. 329, 337.

(*t*) Co. Litt. 78 b.

(*u*) *Doe* d. *Earl of Dunraven* v. *Williams*, 7 C. & P. 332.

(*x*) *Simpson* v. *Dendy*, 8 C. B. N. S. 433.

(*y*) *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304; *Steel* v. *Prickett*, 2 Stark. 463; *Scoones* v. *Morrell*, 1 Beav. 251; *Doe* d. *Barrett* v. *Kemp*, 7 Bing. 332.

(*z*) *Doe* d. *Harrison* v. *Hampson*, 4 C. P. 267.

(*a*) *Grose* v. *West*, 7 Taunt. 39.

(*b*) See, per Holroyd, J., *Doe* d. *Pring* v. *Pearsey*, 7 B. & C. 304, 307; per Lawrence, J., *Vowles* v. *Miller*, 3 Taunt. 137, 138.

(*c*) *Wiltshire* v. *Sidford*, 8 B. & C. 259, n.; *Cubitt* v. *Porter*, *Id.* 257.

(*d*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875, 886, per Bayley, J.; *Holford* v. *Bailey*, 8 Q. B. 1000, 1016, per Lord Denman, *Id.*, in error, 13 Q. B. 426, 444, per Parke, B. See also *Marshall* v. *The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed, 6 *Id.* 570; and Co. Litt. 122 b, with Hargrave's note (7).

(*e*) *Duke of Somerset* v. *Fogwell*, 5 B. & C. 875.

(*f*) See *Mayor, &c. of Carlisle* v. *Graham*, L. Rep., 4 Ex. 361, 368; 3 Stark. Ev. 1253, 3rd Ed.

(*g*) *Ballard* v. *Dyson*, 1 Taunt. 179.

land: the presumption is, that they are quit-rents (*h*). So an allegation of seisin primâ facie implies occupation (*i*).

§ 428. Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony in company with her husband, is excused on the presumption (which, however, may be rebutted) of her having acted under his coercion (*k*). This rule is said not to extend to crimes which are mala in se, and prohibited by the law of nature; nor to such as are heinous in their character, or dangerous in their consequences (*l*). So that murder and treason are clearly excluded from its operation (*l'*), but it is hard to say what this curious exception means; and a married woman has been acquitted on a charge of robbery with violence in which she had herself taken a very active part (*l''*). Nor is there any general distinction between felony and misdemeanour in this respect (*l'''*). Encroachments made by a tenant are considered as annexed to his holding, unless it appears clearly that he intended them for his own benefit, and not to hold them as he held the farm to which they are adjacent (*m*). It is also a maxim, "In præsumptione legis, judicium redditur in invitum" (*n*).

§ 429. In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law that an instrument under seal has been given for consideration; and this presumption can only be removed by impeaching the instrument for fraud (*o*). But there is a remarkable exception to this rule; viz., where an instrument under seal operates in restraint of trade, in which case a real consideration must appear (*p*). So, although in the case of contracts not under seal, a consideration is not in general presumed (*q*), it is otherwise in the case of bills of exchange and promissory notes (*r*).

§ 430. Where goods intrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's

(*h*) *Doe* d. *Whittick* v. *Johnson*, Gow, N. P. C. 173, 174, per Holroyd, J.

(*i*) *Stott* v. *Stott*, 16 East, 351. See *Clayton* v. *Corby*, 2 G. & Dav. 174; *England* v. *Wall*, 10 M. & W. 699.

(*k*) See *Reg.* v. *Torpey*, 12 Cox, 45.

(*l*) Arch. Crim. Plead. 20th Ed., at p. 26.

(*l'*) *Id.*, citing *R.* v. *Manning*, 2 C. & K. 903, n.

(*l''*) *Reg.* v. *Torpey*, 12 Cox, 45.

l''') *Reg.* v. *Torpey*, *suprà*. In this case the wife was tried alone, her husband having escaped.

(*m*) *Andrews* v. *Hailes*, 2 E. & B. 349; *Doe* d. *Croft* v. *Tidbury*, 14 C. B. 304; *Kingsmill* v. *Millard*, 11 Exch. 313; *Earl of Lisburne* v. *Davies*, L. Rep., 1 C. P. 259.

(*n*) Co. Litt. 248 b; 5 Co. 28 b; 10 Co. 94 b. See *infrà*, ch. 9.

(*o*) Bk. 2, pt. 3, § 220.

(*p*) See *Mitchell* v. *Reynolds*, 1 Sm. L. C.

(*q*) *Rann* v. *Hughes*, 7 T. R. 350, n.

(*r*) *Suprà*, sect. 1, sub-sect. 1, § 314.

enemies, it is a *præsumptio juris et de jure* that they were lost by negligence, fraud, or connivance on his part (*s*).[1] By the act of God is meant storms, lightning, floods, earthquakes, and such direct, violent, sudden, and irresistible act of nature as could not by any reasonable care have been foreseen or resisted (*t*); and under the head of the Queen's enemies must be understood public enemies, with whom the nation is at open war (*u*); so that robbery by a mob, irresistible from their number, would be no excuse for the bailee (*x*). This is an extremely severe presumption, but one which public policy appears to require; although both by the common law, and by virtue of various modern statutes, common carriers can, in many cases, limit their liability (*y*). So in the case of innkeepers, before the 26 & 27 Vict. c. 41, — which has considerably modified their liability, — where the goods of a traveller brought into an inn were lost, it was presumed to be through negligence in the innkeeper; and the law cast on him the onus of rebutting this presumption (*z*).[2] "Rigorous as this law may seem," says Sir William Jones (*a*), "and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of

(*s*) Bull. N. P. 70, n. (*a*); *Palmer* v. *The Grand Junction Railway Company*, 4 M. & W. 749.

(*t*) *Nugent* v. *Smith*, 1 C. P. D. 423.

(*u*) Story, Bailm. § 489, 5th Ed.

(*x*) *Coggs* v. *Bernard*, 2 L. Raym. 909, 918, per Holt, C. J.

(*y*) See Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68; Railway and Canal Traffic Act, 17 & 18 Vict. c. 31.

(*z*) Story, Bailm. §§ 472, 473, 5th Ed.; *Armistead* v. *Wilde*, 17 Q. B. 261; *Cashill* v. *Wright*, 6 E. & B. 891. As to effect of 26 & 27 Vict. c. 41, see *Spice* v. *Bacon*, 2 Q. B. D. 463 — C. A.

(*a*) Jones on Bailments, 95, 96, 4th Ed.

[1] Conf. § 43, n. 1, *supra*. Like most conclusive presumptions, this rule is part of the substantive law, and amounts to saying, in a rather awkward way, that a common carrier, with the exceptions noted in the text, is liable as an insurer of the goods intrusted to his charge, in the absence of special contract. For the American authorities, see Propeller Niagara *v.* Cordes, 21 How. 7; Shaw *v.* Gardner, 12 Gray, 488; Mitchell *v.* Western, &c. R. R. Co., 30 Ga. 22; Boorman *v.* Amer. Express Co., 21 Wis. 152; Condict *v.* R. R., 54 N. Y. 500; Am. Trans. Co. *v.* Moore, 5 Mich. 368; Mershon *v.* Hobensack, 2 Zab. (N. J.) 372; York Co. *v.* R. R., 3 Wall. 107. Conf. § 296, n. 1, B. VII. (*e*), *supra*.

[2] So in America, it seems. Read *v.* Amidon, 41 Vt. 15, 18; Laird *v.* Eichold, 10 Ind. 212; Kelsey *v.* Berry, 42 Ill. 469, acc. The law generally prevailing in America, however, is to the effect that an innholder is absolutely liable for the loss of goods deposited by a guest in his house, provided such loss do not arise from the plaintiff's negligence, the act of God, or by means of the public enemy. Pinkerton *v.* Woodward, 33 Cal. 557; Hulett *v.* Swift, 33 N. Y. 571; Wilkins *v.* Earle, 44 N. Y. 172; Norcross *v.* Norcross, 53 Me. 163; Sibley *v.* Aldrich, 33 N. H. 553. See also Fuller *v.* Coats, 18 Oh. St. 343, 350.

such combinations, or even of their *negligence*, if no actual fraud had been committed by them." In this, as in many other instances of legal presumption, we may detect the application of the maxim, "Multa in jure communi contra rationem disputandi, pro communi utilitate introducta sunt" (*b*).

(*b*) Co. Litt. 70 b.

AMERICAN NOTES.

(§ 426) Soil under Tide-waters. — In the United States such soil is presumed to belong to the State as trustee for the public. U. S. *v.* Pacheco, 2 Wall. 587, 590; Stevens *v.* Paterson, &c. R. R., 5 Vroom, 532, 545, 555. But see Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, in which case it was held that riparian proprietors along the Delaware and Schuylkill rivers owned to low-water mark. The extent of the territorial jurisdiction of a maritime State of this Union is that of an independent nation. Pollard's Lessee *v.* Hagan, 3 How. 212; Gough *v.* Bell, 21 N. J. L. 156; New Orleans *v.* U. S., 10 Pet. 662, 737; Mahler *v.* Transportation Co., 35 N. Y. 358; U. S. *v.* Smiley, 6 Sawyer, 640; Den *v.* Jersey Co., 15 How. 426; Barney *v.* Keokuk, 94 U. S. 324; Paul *v.* Hazleton, 37 N. J. L. 106; State *v.* Sargent, 45 Conn. 358; Moulton *v.* Libbey, 37 Me. 472; Clement *v.* Burns, 43 N. H. 609; Providence Co. *v.* Steamship Co., 12 R. I. 348; Dunlap *v.* Commonwealth, 108 Pa. St. 607; People *v.* Ferry Co., 68 N. Y. 71; Towle *v.* Remson, 70 N. Y. 303; Manchester *v.* Massachusetts, 139 U. S. 240, 264. This territorial jurisdiction is based on ownership of the soil under tide water, and carries with it the right to regulate and control the capture of fish of all kinds, fixed or water borne. Corfield *v.* Coryell, 4 Wash. C. Ct. Rep. 371; Com. *v.* Manchester, 152 Mass. 230; Weston *v.* Sampson, 8 Cush. 347; Smith *v.* Maryland, 18 How. 71, 74; McCready *v.* Virginia, 94 U. S. 391; Hardin *v.* Jordan, 140 U. S. 371. Such a property right on the part of the State does not conflict with the power of Congress to regulate commerce. Stockton *v.* R. R., 32 Fed. Rep. 9; Corfield *v.* Coryell, 4 Wash. C. Ct. Rep. 371; Durham *v.* Lamphere, 3 Gray, 268; Haney *v.* Compton, 36 N. J. L. 507. Nor with the power of the executive to make treaties with the consent of the Senate. The State property rights in fish may be made the subject of treaty. See Canadian Reciprocity Treaty of 1871; U. S. *v.* 43 Gals. of Whiskey, 93 U. S. 188. Or with the admiralty jurisdiction of the federal courts. Manchester *v.* Massachusetts, 139 U. S. 240, 263. So also of the river Ohio. Blanchard *v.* Porter, 11 Ohio, 138. See also Boston *v.* Richardson, 105 Mass. 351; Middleton *v.* Pritchard, 3 Scamm. (Ill.) 510. With regard to navigable rivers not tidal, the general presumption is said to be that riparian proprietors own *ad medium filum aquæ*, subject to the public easement of navigation. Deerfield *v.* Arms, 17 Pick. 41; Child *v.* Starr, 4 Hill (N. Y.), 369; Adams *v.* Pease, 2 Conn. 481. It is said to be "presumed" that the alluvion belongs to the owner of the adjoining premises, — the familiar instance of a rule of substantive law masquerading as a rule of evidence. Saulet *v.* Shepherd, 4 Wall. 502.

Section III.

PRESUMPTIONS AND PRESUMPTIVE EVIDENCE IN CRIMINAL LAW.

§ 431. The subject of presumptions and presumptive evidence in criminal law requires a separate consideration. In the present section we accordingly propose to treat, —

1. Presumptions in criminal law.
2. Presumptive proof in criminal cases.
3. The principal forms of inculpatory presumptive evidence in criminal proceedings.

Sub-Section I.

PRESUMPTIONS IN CRIMINAL LAW.

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§ 432. The introduction of legal presumptions into criminal jurisprudence presents a question of some difficulty. Although no person ought to be condemned in a court of justice, unless the tribunal really and actually believes in his guilt, yet even here the principle of legal presumption may, with due discretion, be advantageously resorted to for the protection alike of the community and the accused. And accordingly we find, that not only are the general presumptions of law recognised in criminal jurisprudence, but that it has peculiar presumptions of its own. The universal presumption of acquaintance with the penal law (*c*), and the maxim "res judicata pro veritate accipitur" (*d*), exist there in full force. Ignorance of any law which has been duly promulgated cannot be pleaded in a criminal court; and a person who has once been tried for an offence, under circumstances where his safety was in jeopardy by the proceedings, cannot, if acquitted, be tried again for that offence, whatever new arguments

(*c*) Introd. pt. 2, § 45, and *suprà*, sect. 2, sub-sect. 1.

(*d*) Introd. pt. 2, § 44, and *infrà*, ch. 9.

to prove his guilt may be discovered, or whatever fresh proofs of it may come to light.

§ 433. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person.[1] So, where a baker delivered adulterated bread for the use of a public asylum, it was held unnecessary to allege that he intended it to be eaten, as the law would imply that from the delivery (*e*). The setting fire to a building is evidence of an intent to injure the owner, although no motive for the act be shown (*f*); and the uttering a forged document is conclusive of an intent to defraud the person who would naturally be affected by it, — an inference which is not removed merely by that party swearing that he believes the accused had no such intention (*g*). So where a party deliberately publishes defamatory matter, malice will be presumed (*h*). In such cases *res ipsa in se dolum habet* (*i*), — the facts speak for themselves. Presumptions of this kind are so conformable to reason that moral conviction and legal intendment are here in perfect harmony. But the safety of society, joined to the difficulty of proving psychological facts (*k*), renders imperatively necessary a presumption which may seem severe; viz., that which casts on the accused the onus of justifying or explaining certain acts which are primâ facie illegal. It is partly on this principle that sanity is presumed in preference to

(*e*) *R.* v. *Dixon*, 3 Mau. & S. 11.

(*f*) *R.* v. *Farrington*, R. & R. 207.

(*g*) *R.* v. *Sheppard*, R. & R. 169. See also *R.* v. *Mazagora*, *Id.* 291; *R.* v. *Nash*, 2 Den. C. C. 493. By 24 & 25 Vict. c. 98, s. 44, it is sufficient, in any indictment for forging, &c., an instrument, where it is necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and the same rule applies to the trial of any such offence.

(*h*) *Haire* v. *Wilson*, 9 B. & C. 643.

(*i*) Bonnier, Traité des Preuves, §§ 676, 677.

(*k*) "Comen erudition est que l'entent d'un home ne serra trie, car le Diable n'ad conusance de l'entent de home;" per Brian, C. J., P. 17 Edw. IV. 2 A. pl. 2. See, however, that case.

[1] In America, the law is the same. Conner *v.* State, 4 Yerg. 137; Com. *v.* Drum, 58 Pa. St. 9; State *v.* Smith, 2 Strob. 77; Riggs *v.* State, 30 Miss. 635; Murphy *v.* People, 37 Ill. 447; State *v.* Bertrand, 3 Oreg. 61, acc. But see U. S. *v.* McClare, 17 Bost. Law Rep. 439; Kingen *v.* State, 45 Ind. 518, *contra*. In many instances, however, to say that intent is *presumed* is simply another mode of saying that when crime is proven the intent with which it is committed becomes immaterial with regard to the question of liability. Even in cases where evidence is entirely circumstantial, motive and intent are not necessarily to be directly proved, though both, doubtless, are strong circumstances for the consideration of the tribunal.

innocence (*l*), even in the case of suicide (*m*).[1] So a party who is proved to have killed another is presumed in the first instance to have done it maliciously, or at least unjustifiably; and consequently all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him (*n*).[2]

§ 434. A criminal intent is sometimes transferred by law from one act to another,[3] the maxim being "In criminalibus sufficit generalis malitia intentionis cum facto paris gradus" (*o*). A., maliciously discharging a gun at B., kills C.; A. is guilty of murder, for the malice is transferred from B. to C. (*p*). And the same holds where poison laid by A. for B. is accidentally taken by C. (*q*). It is on this principle that a party who accidentally kills himself in the attempt to murder another is deemed felo de se (*r*).

§ 435. In some cases the law goes farther, and attaches to acts criminal in themselves a degree of guilt higher than that to which they are naturally entitled. It was on this principle that the entering into measures for deposing or imprisoning the king was held to be an overt act of compassing his death (*s*). So if a man, without justification, assaults another with the intention of giving him only a slight beating, and death ensues, he is held to be guilty of homicide (*t*). And if several persons go out with the intention of commit-

(*l*) 2 Ev. Poth. 332; Answer of the Judges to the House of Lords, 8 Scott, N. R. 595, 601; 1 Car. & K. 134, 135. See *supra*, sect. 1, sub-sect. 3, § 332.

(*m*) The laws of some countries, it is believed, have established it as a præsumptio juris et de jure that all suicides are insane.

(*n*) Fost. Cr. Law, 255, 290.

(*o*) Bacon, Max. Law, Reg. 15. See also 3 Inst. 51.

(*p*) 1 East, P. C. 230; *R.* v. *Smith*, 1 Dearsl. C. C. 559.

(*q*) Plowd. 474; 1 East, P. C. 230.

(*r*) 1 Hale, P. C. 413; 1 East, P. C. 230.

(*s*) Fost. Cr. Law, 195–196.

(*t*) 4 Blackst. Comm. 200.

[1] The "presumption of innocence" has no evidentiary force, being founded upon no presumption of fact. It is in most instances a paraphrase for the rules regulating the "burden of proof" in criminal, and sometimes in civil (Steph. Dig. Law Ev., art. 94) cases. Conf. § 296, n. 1, B. VII. (*a*), *supra*. On the other hand, the presumption of sanity has the evidentiary force of the presumption of fact upon which it is founded. Conf. § 296, n. 1, B. III. (*b*), (*c*), *supra*. In all collateral cases, therefore, where the meaning of the presumption of innocence is not that a certain *quantum* of evidence is required, it means nothing. Sanity is, in such cases, said by the American cases to be presumed in preference to it. Gay *v.* Union, &c. Ins. Co., 9 Blatch. 142. See also Cooper *v.* Mass., &c. Ins. Co., 102 Mass. 227; Van Zandt *v.* Ins. Co., 55 N. Y. 169; Eastbrook *v.* Union Ins. Co., 54 Me. 224.

[2] See § 296, n. 1, B. IV., *supra*. For American cases, see State *v.* Harris, 63 N. C. 1; Murphy *v.* People, 37 Ill. 447; State *v.* Bertrand, 3 Oreg. 61, acc. But see also Com. *v.* Hawkins, 3 Gray, 463; U. S. *v.* Armstrong, 2 Curtis, C. Ct. 446.

[3] For some consideration of the American law, see Whar. Hom. §§ 42–48; State *v.* Benton, 2 Dev. & Bat. 196; Angell *v.* State, 36 Tex. 542; State *v.* Smith, 2 Strob. 77, acc.; Bratton *v.* State, 10 Humph. 103, *contra*.

ting a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it (*u*).

§ 436. The presumptions in the two preceding articles are particular cases of the maxim, "Qui semel malus, semper præsumitur esse malus eodem genere" (*x*), another instance of which has been already given (*y*). But the foregoing applications of it, especially the second, have been attacked by some modern writers as being repugnant to natural justice and humanity (*z*); as well as to the passages of the Roman law, "In maleficiis voluntas spectatur, non exitus" (*a*), "Fraudis interpretatio semper in jure civili, non ex eventu duntaxat, sed et consilio quoque desideratur" (*b*). But it may well be doubted whether these passages, standing as they do in the Digest without context, mean to express more than the unquestionable principle that there can be no crime where there is no criminal intention; or, as our own law has it, "Actus non facit reum nisi mens sit rea" (*c*). And so far from being at variance with natural justice or humanity, the maxim in question seems to be a principle of general jurisprudence, and is founded in true morality and policy. The principle is recognised in the laws of France (*d*) and Louisiana (*e*), and, it is said, of China also (*f*), and, in some cases at least, by the Roman law (*g*); while the maxim in terms is found in the canon law (*h*), and is thus ably explained by one of the commentators upon it: "'Semel malus, semper præsumitur malus.' Regula videtur contraria charitati, quæ non cogitet malum; sed non est. Non enim charitatis est malum non cogitare in omni casu, sed tantùm, cum nullum subest fundamentum, quale subest in casu regulæ; præterea non præsumitur hic malus in omni mali genere, sed in eo tantùm, in quo malus inventus est, idque solum, ut impediatur ne simile malum perpetret; unde hæc præsumptio non obest, sed potius prodest ei in quem cadit: uno verbo præsumptio de quâ regula, non est maligna, sed cauta, utpote non nata ex pravâ malè judicandi consuetudine, aliove vitio, sed ex justo metu" (*i*). No considerations of policy can justify the condemnation of a man who is either innocent, or of whose guilt any reasonable doubt exists; but it is very different where there is a proved basis of guilty intention to work on. There a man is rightly held accountable

(*u*) 1 Hale, P. C. 439.
(*x*) Cro. Car. 317.
(*y*) *Suprà*, sect. 2, sub-sect. 8, § 413.
(*z*) Benth. Jud. Ev. bk. 5, ch. 4; Phillimore, Principles and Maxims of Jurisprudence, 43.
(*a*) Dig. lib. 48, tit. 8, l. 14.
(*b*) Dig. lib. 50, tit. 17, l. 79.
(*c*) Bk. 1, pt. 1, § 96.
(*d*) Bonnier, Traité des Preuves, § 674.
(*e*) Crim. Code of Louisiana, § 41.
(*f*) Benth. Jud. Ev. bk. 5, ch. 4.
(*g*) See Dig, lib. 47, tit. 10, l. 18, § 3.
(*h*) Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. Reg. 8.
(*i*) Gibert, Corp Jur. Can. Proleg. Pars Post. tit. 7, cap. 2, § 2, n. 20.

for the natural consequences of his misconduct, though he may not have intended them; and perilous indeed would it be to the community were this otherwise. The enormity of an offence is made up, not only of the actual amount of mischief done by the criminal, but of the tendency of his conduct to encourage others to break the law; and in measuring this latter, regard must be had to the notorious difficulty of proving psychological facts. Look at the cases already put (*k*). A man, without justification, assaults another with the intention of giving him only a slight beating: death ensues; ought a judicial tribunal to permit him to contend that he was not responsible for homicide? So if several persons go out with the intention of committing a felony, surely the law is perfectly justified in holding each responsible for all acts done by his companions in furtherance of the general design. For not only was the person who did the act encouraged in, if not instigated to, his guilt, by the presence of the rest; but when several persons are involved in such a transaction, it is often extremely difficult to apportion to each his precise share of guilty intention; and if the onus of doing this with accuracy were cast upon the law, the most wicked and cunning criminals would frequently escape their just punishment.

§ 437. Many artificial presumptions have from time to time been introduced by statute into our criminal code. An instance is presented in the well-known statute 21 Jac. 1, c. 27 (*l*), by which it was enacted that any woman delivered of a bastard child, who should endeavour to conceal its birth, should be deemed to have murdered it, unless she proved it to have been born dead (*m*). So the 24 & 25 Vict. c. 98, s. 13, renders it felony for any person to purchase, receive, or have in his custody or possession, without lawful excuse, — the proof whereof shall lie on the party accused, — any forged bank-note, or other forged document of the nature therein specified, knowing the same to be forged. So, by the 33 & 34 Vict. c. 58, s. 5, it is felony for any person, without lawful authority or excuse, — the proof whereof shall lie on the party accused, — to engrave or make any stock certificate, or coupon, or to do certain other acts therein specified. And by "The Foreign Enlistment Act, 1870" (*n*), any ship, built by order or on behalf of any foreign state when at war with a friendly state, or delivered to, or to the order of, such foreign state or of any person who, to the knowledge of the person building, is an agent of such foreign state, or which is paid for by such foreign state or such agent, and is employed in the military or naval service of

(*k*) § 435.

(*l*) See Introd. pt. 2, § 46.

(*m*) This reproach to our legislation was removed by 43 Geo. 3, c. 58, s. 3.

(*n*) 33 & 34 Vict. c. 90, s. 9.

such foreign state, shall, until the contrary is proved, be deemed to have been built with a view to being so employed; and the onus of proving that he did not know that the ship was intended to be so employed, is cast on the builder. Similar enactments are to be found in the Larceny Act, 1861, s. 58, in the Coinage Act, 1861, ss. 23 and 24, and in the Explosive Substances Act, 1883, s. 4.

§ 438. Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant under seven years of age is conclusively presumed incapable of committing felony (*o*); between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence (*p*);[1] and a boy under fourteen is conclusively presumed incapable of committing a rape as principal in the first degree (*q*).

Sub-Section II.

PRESUMPTIVE PROOF IN CRIMINAL CASES GENERALLY.

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§ 439. The rules regulating the *admissibility* of evidence are, in general, the same in civil as in criminal proceedings (*r*); and although

(*o*) 4 Blackst. Comm. 23; 1 Hale, P. C. 27, 28.

(*p*) *Id.*; 1 Hale, P. C. 26, 27.

(*q*) *Id.* 212; and 1 Hale, P. C. 630.

(*r*) See bk. 1, pt. 1, § 94. There is a statutory distinction as to unstamped documents, which by the Stamp Act, 1891, re-enacting former enactments to the same effect, are admissible in criminal, but not in civil, proceedings.

[1] For an American case, see State *v.* Goin, 9 Humph. 175, acc.

presumptive evidence is receivable to prove almost any fact (*s*), the necessity for resorting to it is more frequent in the latter than in the former. The most heinous offences are usually committed in secret, — visible proofs of works of darkness must not be expected; and accordingly direct testimony against criminals is rarely attainable, except in those cases where one of several delinquents denounces his companions at the bar of justice. We do not mean that, for want of legitimate evidence, the law condemns and punishes on that which is inferior or less conclusive, — quite the reverse. A chain of presumptive evidence often affords proof quite as convincing as the testimony of eye-witnesses (*t*); and as in criminal trials the interests at stake are greater, and the consequences of error infinitely more serious, a higher degree of assurance is required for condemnatory decision than in civil proceedings, where the mere preponderance of probability is sufficient ground for adjudication (*u*).

§ 440. While all attempts to reduce the credibility of evidence to fixed degrees must ever be deprecated as absurd and mischievous, the experience of past ages would indeed be thrown away if it did not point out the principal quicksands and dangers to be avoided, when dealing with the serious question of the guilt or innocence of persons charged with crime. Numerous rules have from time to time been suggested for the guidance of tribunals in this respect, among which the following are the soundest in principle, and most generally recognised in practice: —

1. The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor (*x*).

2. The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused (*y*).

3. In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape than that one innocent person should suffer (*z*).

§ 441. The above hold universally; but there are two others peculiarly applicable when the proof is presumptive.

I. *There must be clear and unequivocal proof of the corpus delicti* (*a*).[1] Every criminal charge involves two things: first, that an

(*s*) Ch. 1, § 294.
(*t*) *Id.* §§ 295, 297.
(*u*) Bk. 1, pt. 1, § 95.
(*x*) *Suprà*, sect. 2, sub-sect. 3, § 346.
(*y*) Bk. 1, pt. 1, § 95.
(*z*) Introd. pt. 2, § 49, and bk. 1, pt. 1, § 95.
(*a*) *R.* v. *Burdett*, 4 B. & A. 95, 123, and

[1] So in America. State *v.* Davidson, 30 Vt. 377; Smith *v.* Com., 21 Gratt. 809; State *v.* Keeler, 28 Ia. 551, acc. But the *corpus delicti* may be established by circumstantial evidence. People *v.* Rulloff, 3 Parker, C. R. 401; Stocking *v.* State, 7 Ind. 326; U. S. *v.* Williams, 1 Cliff. C. Ct. 5. See also State *v.* Lamb, 28 Mo. 218.

offence has been committed; and secondly, that the accused is the author, or one of the authors, of it. "I take the rule to be this," says Lord Stowell in his judgment in *Evans* v. *Evans* (*b*), — "if you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti* . . . ; but to take presumptions in order to swell an equivocal fact — a fact that is absolutely ambiguous in its own nature — into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions." Sir Matthew Hale, also, in his Pleas of the Crown (*c*), laid down the two following rules, which have met with deserved approbation: "I would never convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead" (*d*). And in Starkie on Evidence (*e*) it is stated to be "an established rule, upon charges of homicide, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body." Such is the language of these eminent authorities.[1] But the general principles they lay down must be taken with considerable limitation; and in order to treat the subject with accuracy, it is to be remarked that in some offences the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving its author undetermined, — the former being denominated by foreign jurists "delicta facti transeuntis," and the latter "delicta facti permanentis" (*f*). Under the former — *i. e.*, delicta facti transeuntis — are ranged those offences the essence of which consists in intention, such as various forms of treason, conspiracy, criminal language, &c.; all which, being of an exclusively psychological nature, must necessarily be established by presumptive evidence (*g*), unless the guilty

162; Wills, Circ. Evid. 156, 3rd Ed.; *Evans* v. *Evans*, 1 Hagg. C. R. 35, 105; Burnett's Crim. Law of Scotland, 529; D'Aguesseau (Œuvres), tom. 4, pp. 422–423, 456: "Diligenter cavendum judici, ne supplicium præcipitet, antequam de crimine constiterit." Matth. de Crim. ad Dig. lib. 48, tit. 16, c. 1, n. 2.

(*b*) 1 Hagg. C. R. 35, 105.

(*c*) 2 Hale, P. C. 290.

(*d*) The coincidence between this and the following is observable, — "De corpore interfecti necesse est, ut constet. . . . Si quis fassus se furem, confessio hæc non obest, nisi constet etiam in specie de rebus furto subtractis." Matthæus, de Prob. cap. 1, n. 4.

(*e*) 1 Stark. Ev. 575, 3rd Ed.; *Id.* 862, 4th Ed.

(*f*) Bonnier, Traité des Preuves, § 56; Case of Capt. Green and his Crew, 14 How. St. Tr. 1230.

(*g*) 3 Benth. Jud. Ev. 5; *R.* v. *Burdett*, 4 B. & A. 95, 122; Bonnier, Traité des Preuves, § 56; see Introd. pt. 1, § 12.

[1] The American cases support this view. Tyner *v.* State, 5 Humph. 383.

party chooses to make a plenary confession (*h*). To these must be added the crime of adultery, respecting which Lord Stowell himself, in other places, lays down as a fundamental rule that it is not necessary to prove the fact by direct evidence (*i*); but that it is enough to prove such proximate circumstances as, by former decisions, or their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed (*k*). By the canon law of this country, however, this crime could not be proved by the unsupported confession, however plenary, of the wife (*l*). But the Divorce Court, not being a court of ecclesiastical jurisdiction, nor bound by rules of merely ecclesiastical authority, may in such a case act on the admissions of the wife, although they are not supported by any other evidence (*m*).

§ 442. In the other sort of cases — delicta facti permanentis; or, as they have been sometimes termed, delicta cum effectu permanente (*n*) — the proof of the crime is separable from that of the criminal. Thus the finding a dead body, or a house in ashes, may indicate a crime, but does not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The corpus delicti, in cases such as we are now considering, is made up of two things: first, certain facts forming its basis; and secondly, the existence of criminal agency as the cause of them (*o*). It is with respect to the former of these that the general principles of Lord Stowell and Sir Matthew Hale especially apply, the established rule being that the facts which form the basis of the corpus delicti ought to be proved, either by direct testimony or by presumptive evidence of the most cogent and irresistible kind, or by a clear and unsuspected confession of the party (*p*). This is particularly necessary in cases of murder, where the maxim laid down by Sir Matthew Hale seems to have been generally followed; namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was

(*h*) *Infrà*, ch. 7.

(*i*) *Loveden* v. *Loveden*, 2 Hagg. C. R. 1; *Williams* v. *Williams*, 1 *Id.* 299. See to the same effect, Ayl. Parerg. Jur. Canon. Angl. 45; Mascard. de Prob. quæst. 10, n. 16; and Concl. 57–65; Sanchez de Matrimonio, lib. 10, disput. 12, n. 40.

(*k*) *Williams* v. *Williams*, 1 Hagg. C. R. 299, 300.

(*l*) See the judgment of Lord Stowell in *Mortimer* v. *Mortimer*, 2 Hagg. C. R. 310, 316; and *infrà*, ch. 7, sect. 3, subsect. 3.

(*m*) *Robinson* v. *Robinson*, 29 L. J., P. & M. 179; *Williams* v. *Williams*, L. Rep., 1 P. & D. 29.

(*n*) 14 How. St. Tr. 1230.

(*o*) "Constare (crimen) non dicitur, simul atque de facto constiterit: etiam de dolo et causâ facti liquere debet." Matth. de Crim. ad Dig. lib. 48, tit. 16, cap. 1, n. 2. See also Bonnier, Traité des Preuves, § 56.

(*p*) See *infrà*, ch. 7.

done, or by proof of the dead body, or some portion of the dead body, having been found (*q*); and where the body is in a state of decomposition, or is reduced to a skeleton, or is, for any other reason, in such a state as to render identification by inspection impossible, it should be identified by dress or circumstances (*r*), — "Liquere debet hominem esse interemptum" (*s*).

§ 443. This rule rests on principles which have their foundation in the deepest equity and soundest policy. In the first place, when the crime is separable from the person of the criminal, many sources of error are introduced which do not exist in the opposite case. 1. A given event, the origin of which is unascertained, may be the result of almost innumerable causes, having their source either in accident or the agency of other persons. 2. The danger of rashly inferring the guilt of a suspected person from inconclusive circumstances may be aggravated by his own imprudence, or even by his criminal agency in other matters. 3. In witnesses and tribunals, the love of the marvellous and the desire to detect great crimes committed in secret. 4. The facility afforded by the preceding causes to false accusations against persons who are disliked. In the second place, the conviction of a man for an imaginary offence is a scandal to the administration of justice, and is also an injury to society infinitely greater than an erroneous conviction for an offence really committed (*t*).

§ 444. The sound policy of this rule is fearfully established by some old cases. A very celebrated one, related by Sir Edward Coke, has been already given under the head of presumptions made in disfavour of the spoliator (*u*). Sir Matthew Hale also mentions an instance where a man was missing for a considerable time, and there was strong ground for presuming that another had murdered him,

(*q*) The practice of simulating death to attain particular objects is common in the East. See Family Library: Sketches of Imposture, Deception, and Credulity, ch. 9, p. 139. "When some officers in India were breakfasting in the commander's tent, the body of a native, said to have been murdered by the Sepoys, was brought in and laid down. The crime could not be brought home to any one of them, yet there was the body. A suspicion, however, crossed the adjutant's mind; and having the kettle in his hand, a thought struck him that he would pour a little boiling water on the body. He did so; on which the murdered remains started up, and scampered off." No authority is cited

(*r*) In *R.* v. *Clewes*, 4 C. & P. 221, the skeleton of a man was, after a lapse of twenty-three years, identified by his widow, from some peculiarity about the teeth. A carpenter's rule and a pair of shoes found with his remains were also identified. When a skeleton is found, it frequently becomes of the utmost importance to determine whether it is that of a male or female, of a young or old person. For full information on this subject the reader is referred to Beck's Med. Jurisp. p. 539 *et seq.*, 7th Ed., where several cases illustrative of the necessity of attending to it are given.

(*s*) D'Aguesseau (Œuvres), tom. 4, p. 456.

(*t*) See Introd. pt. 2, § 49, and n. (*q*) there.

(*u*) *Suprà*, sect. 2, sub-sect. 8, § 415.

and consumed the body to ashes in an oven. The supposed murderer was convicted and executed; after which the other man returned from sea, where he had been sent against his will by the accused, who, though innocent of murder, was not entirely blameless (*x*). There is also the case of a man named John Miles, who was executed for the murder of his friend, William Ridley, with whom he had been last seen drinking, and whose body was not found until after the execution of Miles. The deceased had, while in a state of intoxication, fallen into a deep privy, where no one thought of looking for him (*y*).[1] This rule is said to have been carried so far that where the mother and reputed father of a bastard child were observed to strip and throw it into the dock of a seaport town, after which the body of the infant was never seen, Gould, J., who tried the father and mother for the murder, advised an acquittal, on the ground that, as the tide of the sea flowed and reflowed into and out of the dock, it might possibly have carried out the *living* infant (*z*).

§ 445. Where, however, the fact of the murder is proved by eye-witnesses, the inspection of the dead body may be dispensed with, as is well illustrated by *R.* v. *Hindmarsh* (*a*). There the prisoner, a seaman, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by blows with a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that while the ship was lying off the coast of Africa, with other vessels near, the prisoner was seen one night to take the captain up and throw him into the sea, after which he was never heard of; while near the place on the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this it was objected by the prisoner's counsel that the corpus delicti was not proved, as the captain might have been taken up by some of the neighbouring vessels, citing Sir Matthew Hale and the case before Gould, J. The court, consisting of the judge of the Admiralty, Ashhurst, J., Hotham, B., and several doctors of the civil law, admitted the general rule of law; but Ashhurst, J., who tried the case, left it to the jury upon the evidence to say whether the deceased was not killed before his body was cast into the sea; and the jury having found in the affirmative, the prisoner was convicted, and the conviction was afterwards held good by all the judges.

(*x*) 2 Hale, P. C. 290.

(*y*) Theory of Presumptive Proof, Append. case 5. See also the case of Antoine Pin, 5 Causes Célèbres, 449, Ed. Richer, Amst. 1773.

(*z*) Per Garrow, *arguendo* in *R.* v. *Hindmarsh*, 2 Leach, C. L. 569, 571.

(*a*) 2 Leach, C. L. 569.

[1] See 7 West. L. J. 25.

§ 446. Whether it is competent, even in extreme cases, to prove the basis of the corpus delicti by presumptive evidence, has been questioned. But it seems a startling thing to proclaim to every murderer that, in order to secure impunity to himself, he has nothing to do but consume or decompose the body by fire or lime, or to sink it in an unfathomable part of the sea (*b*). Unsuccessful attempts of this kind are known to have been made (*c*), and successful ones may have remained undiscovered.

§ 447. The basis of a corpus delicti once established, presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place of the commission of the offence (*d*), — the locus delicti (*e*); and even to show the presence of crime by negativing the hypotheses, that the facts proved were the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration (*f*). On finding a dead body, for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, &c., or have been the result of suicide. On this latter subject the following excellent directions, given by Dr. Beck to the members of his own profession, may not inaptly be inserted here (*g*): "Besides noticing the surface of the body, and ascertaining whether ecchymosis or

(*b*) 3 Benth. Jud. Ev. 234; Bonnier, Traité des Preuves, § 56. We believe that Rolfe, B., once directed a grand jury that the rule excluding presumptive evidence of the basis of the corpus delicti is not universal. On this subject Chancellor d'Aguesseau expresses himself as follows: "A Dieu ne plaise que le public puis jamais nous reprocher que nous donnons aux criminels une espérance d'impunité, en reconnaissant qu'il est impossible de les condamner, lorsque leur cruelle industrie aura été assez heureuse pour dérober aux yeux de la Justice, les misérables restes de celui qu'ils ont immolé à leur vengeance." D'Aguesseau, Ler Plaidoyer dans la cause du Sieur de la Pivadière, &c.

(*c*) In *R.* v. *Cook*, Leicester Sum. Ass. 1834, Wills, Circ. Ev. 165, 3rd Ed., the prisoner was tried for the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning. The effluvium and other circumstances, however, alarmed the neighbours; and a portion of the body remaining unconsumed, the prisoner was convicted and executed. A similar attempt was made by the accused in *The Commonwealth* v. *Webster*, Burr. Circ. Evid. 682.

(*d*) *R.* v. *Burdett*, 4 B. & A. 95.

(*e*) Dicks. Ev. in Scotl. 43.

(*f*) So laid down by Buller, J., in the celebrated case of Captain John Donellan, who was convicted and executed for the murder by poison of his brother-in-law, Sir Theodosius Boughton (Warwick Sp. Ass. 1781, Report by Gurney); by Parke, B., in *R.* v. *Tawell*, who was convicted of murder by poison at the Aylesbury Spring Assizes of 1845 (Wills, Circ. Ev. 188, 3rd Ed.); by Abbott, J., in *R.* v. *Donnall*, Launceston Sp. Ass. 1817 (*Id.* 187); by Wilde, C. J., in *R.* v. *Hatfield*, Surr. Sp. Ass. 1847, MS.; by Lord Campbell, in *R.* v. *Palmer*, Cent. Cr. Ct., May, 1856; and by Pollock, C. B., in *R.* v. *Smethurst*, Cent. Cr. Ct. August, 1859. See also *R.* v. *Eldridge*, R. & R. 440, and *R.* v. *White*, *Id.* 508.

(*g*) Beck's Med. Jurisp. 583, 7th Ed., where several very instructive cases are collected.

suggillation be present, we should pay great attention to the following circumstances, — the situation in which the wounded body is found, the position of its members and the state of its dress, the expression of countenance, the marks of violence, if any be present on the body, the redness or suffusion of the face. The last is important, as it may indicate violence in order to stop the cries of the individual. The quantity of blood on the ground, or on the clothes, should be noticed, and, in particular, the probable weapon used, the nature of the wound, and its depth and direction. In a case of supposed suicide by means of a knife or pistol, the course of the wound should be examined, whether it be upwards or downwards, and the length of the arm should be compared with the direction of the injury. Ascertain whether the right or left arm has been used; and as the former is most commonly employed, the direction should correspond with it, and be from right to left." It is of the utmost importance to examine minutely for the traces of another person at the scene of death; for it is by no means an uncommon practice with murderers so to dispose of the bodies of their victims as to lead to the supposition of suicide or death from natural causes (*h*); while, on the other hand, persons about to commit suicide, but anxious to preserve their reputation after death, or their property from forfeiture, or both, have not unfrequently endeavoured, by special preparations, to avert suspicion of the mode by which they came by their end (*i*). And instances have occurred where, after death from natural causes, injuries have been done to a corpse with a view of raising a suspicion of murder against an innocent person (*k*). The following case strongly illustrates the difficulties which sometimes attend investigations of this nature. A man, on detecting his wife in the act of adultery, fell into a state of distraction, and having dashed his head several times against a wall, struck himself violently and repeatedly on the forehead with a cleaver, until he fell dead from a great number of wounds. All this was done in the presence of several witnesses; but suppose it had been otherwise, and that the dead body had been found with these marks of violence upon it, murder would have been at least suspected (*l*). And even where there is the clearest proof of the infliction of wounds, death may have been caused by previous disease, or by violence from some other source. Cases illustrative of the former hypothesis are pretty numerous (*m*); and the two following show the necessity of not overlooking the latter. At an inn in France, a quarrel arose among some

(*h*) Stark. Ev. 857, 4th Ed.
(*i*) *Id.* 863, 4th Ed.
(*k*) See one of these, bk. 2, pt. 2, § 206.
(*l*) Beck's Med. Jurisp. 562, 7th Ed.
(*m*) Several will be found in Beck's Med. Jurisp. ch. 15, 7th Ed., and Taylor's Med. Jurisp. ch. 29, 7th Ed.

drovers, during which one of them was wounded with a knife on the face, hand, and upper part of the thorax near the right clavicle. The injuries were examined, and found to be superficial and slight. They were washed, and an hour afterwards the wounded man departed for his home; but the next morning he was found dead, bathed in blood. Dissection was made, and the left lung and pulmonary artery were found cut. The surgeons deposed that this injury was the cause of death, and that it must have been inflicted after the superficial wound on the thorax, which was not bloody, but surrounded by ecchymosis. Such proved to be the fact, — on his way home he had been robbed and murdered (*n*). In another case, a girl expired in convulsions while her father was in the act of chastising her for a theft; and she was believed, both by himself and the bystanders, to have died of the beating. But although there were marks of a large number of pretty severe stripes on the body, they did not appear to the medical man who saw it to be quite sufficient to cause death; and he therefore made a post-mortem examination, from which and other circumstances it was discovered that the girl on finding her crime detected had taken poison through fear of her father's anger (*o*).

And, lastly, a source of mischief is found in the destruction or fabrication of *indicia*, through the conduct of persons brought in contact, by duty or otherwise, with the bodies of individuals who have met with a violent death. A good illustration of this is afforded by a case which once occurred in France. A young man was found dead in his bed, with three wounds on the front of his neck. The physician who was first called to see him had, unknowingly, stepped on the blood with which the floor was covered, and had then walked into an adjoining room, passing and repassing several times, and thus left a number of bloody footprints on the floor. The consequence was that suspicion was raised against a party who narrowly escaped being sent to take his trial for murder (*p*).

§ 448. It is in cases of supposed poisoning that the nicest questions arise relative to the proof of a corpus delicti. The evidences of poisoning are either physical or moral. Under the former are included the symptoms during life, the appearance of the body after death, or on dissection, and the presence of poison, ascertained by the application of chemical agents used for its detection. Among the moral evidences are peculiar facilities for committing the crime, the purchasing or preparing poisonous ingredients, attempts to stifle inquiry, spreading false rumours as to the cause of death, abortive

(*n*) Beck's Med. Jurisp. 588, 7th Ed.
(*o*) *Id.* 766, 7th Ed.
(*p*) Tayl. Med. Jurisp. 274, 7th Ed.

endeavours to cast suspicion on others, &c. (*q*). The existence of disease (and poison is not unfrequently administered to persons labouring under it) will often explain the symptoms during life, and, in some cases, the appearances after death, which latter may likewise be the result of putrefaction; so that, in order to obtain clear proof of a corpus delicti, tribunals willingly avail themselves of the scientific tests which chemistry lends to justice for the detection of crime (*r*). The value of these tests has, however, been much overrated. An infallibility has been attributed to them which they most certainly do not possess; and a notion seems to have got abroad that in cases of poisoning, the corpus delicti must be established by those tests alone, to the exclusion of all consideration of the physical and moral circumstances of the case, — a doctrine which is both contrary to law (*s*), and an outrage on common-sense. The science of toxicology is not by any means in a perfect state, particularly as regards the vegetable poisons (*t*); although the tests for one of the worst of them (hydrocyanic, or prussic acid), and for the mineral poison most commonly used for criminal purposes (arsenic), are among the most complete. It is always advisable to employ as many tests as the quantity of suspected matter will admit; for in the case of each individual test there may, by possibility, be other substances in nature which would produce the appearances supposed to be peculiar to the particular poison; and the danger always exists, more or less, of forming the substance the existence of which is suspected, by means of the chemical agents used for its detection. But when several tests, based on principles totally distinct, are applied to different portions of a suspected substance, and each gives the characteristic results of a known poison, the chances of error are indefinitely removed; and the proof of the existence of that poison in that substance, especially if there are corroborative moral circumstances, comes short only of positive demonstration.

§ 449. In dealing with cases of suspected poisoning it must be remembered that even when poison is actually obtained from the dead body, it may not only have been taken by accident, or medicinally, or as in the case of arsenic, for the purpose of clearing the complexion, or with the view of committing suicide; but that instances have occurred where, after death from natural causes, a poisonous substance has been introduced into the corpse (*u*), or

(*q*) "Venenum arguis: ubi emi? à quò? quanti? per quem dedi? quo conscio?" Quintilian, Just. Orat. lib. 5, c. 7, *vers. fin.*

(*r*) The tests of a large number of poisons are given with great minuteness in Beck's Med. Jurisp. See also Taylor's Med. Jurisp.

(*s*) See *suprà*, § 447.

(*t*) Beck's Med. Jurisp. 754, 7th Ed.

(*u*) *Id.* 770, 7th Ed.

into matter vomited, or discharged from the bowels (*x*), with the view of raising a suspicion of murder. This may, however, be detected by a careful post-mortem examination (*y*), and attention to the moral circumstances of the case.

§ 450. Whatever may be the admissibility or effect of presumptive evidence to *prove* the corpus delicti, it is always admissible, and it is often, especially when amounting to evidentia rei, most powerful to *disprove* it. Thus the probability of the statements of witnesses may be tested, by comparing their story with the surrounding circumstances; and in practice false testimony is often encountered and overthrown in this way. Sir Matthew Hale relates an extraordinary trial for rape, which took place before him in Sussex; where the party indicted was an ancient wealthy man, turned of sixty, and the charge was fully sworn against him by a young girl of fourteen, with the concurrent testimony of her mother and father and some other relations; and where the accused defended himself successfully, by showing that he had for many years been afflicted with a rupture so great as to render sexual intercourse impossible (*z*). In another case, the prosecutrix of an indictment against a man for administering arsenic to her to procure abortion deposed that he had sent her a present of tarts, of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains; while after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted; and the prosecutrix afterwards confessed that she had preferred the charge from jealousy (*a*).

§ 451. II. *The hypothesis of delinquency should be consistent with* ALL *the facts proved* (*b*). The chief danger to be avoided when dealing with presumptive evidence arises from a proneness natural to man, to jump

(*x*) Taylor's Med. Jurisp. 16, 4th Ed.

(*y*) Some consequences of poisoning during life, such, for instance, as the traces of recent inflammation in the upper intestines, cannot, it is said, be imitated by poison injected after death. Beck's Med. Jurisp. 770, 7th Ed.

(*z*) 1 Hale, P. C. 635. See bk. 2, pt. 2, § 201.

(*a*) *R.* v. *Whalley*, York Sp. Ass. 1829, Wills, Circ. Ev. 122, 3rd Ed. See further on this subject the elaborate judgment of Lord Stowell in *Evans* v. *Evans*, 1 Hagg. C. R. 105.

(*b*) 1 Stark. Ev. 561, 573, 3rd Ed.: *Id.* 842, 859, 4th Ed.

to conclusions from certain facts, without duly adverting to others which are inconsistent with the hypothesis which those facts seem to indicate (*c*). "The human mind," says Lord Bacon (*d*), "has this property, that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallels, correspondences, and relations between them which have no existence." This natural propensity cannot be too closely watched. If, as was well said by some one, a certain number of pieces of wood will build a house, with the exception of one cross-beam, it is the natural tendency of the mind to reject that beam. It should never be forgotten, as observed by an able writer on the law of evidence, that all facts and circumstances which have really happened, were perfectly consistent with each other, for they did actually so consist (*e*); an inevitable consequence of which is, that if any of the circumstances established in evidence is absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true. Take the case, put in a former section (*f*), of a man being indicted for stealing a piece of timber, and a large body of circumstantial evidence being adduced to show that it was carried off by one person, and that person the prisoner. Now, suppose it were to transpire in the course of the trial that the article stolen was so heavy that twenty men could not move it, here would be a fact absolutely inconsistent with the hypothesis of guilt, and clearly indicating mistake or mendacity somewhere. And not only may the hypothesis of guilt be overturned by facts absolutely falsifying it, but due attention should be paid to all contrary hypotheses and infirmative circumstances.

(*c*) *Suprà*, ch. 1, § 298.

(*d*) Bacon's Novum Organum, Aphorism 45. See also Bacon's Advancement of Learning, bk. 2.

(*e*) 1 Stark. Ev. 560, 3rd Ed.; *Id.* 842, 4th Ed.

(*f*) *Suprà*, sect. 1, sub-sect. 3, § 332.

Sub-Section III.

INCULPATORY PRESUMPTIVE EVIDENCE IN CRIMINAL PROCEEDINGS.

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§ 452. We now proceed to examine more in detail the principal forms of inculpatory presumptive evidence in criminal cases. They are reducible to these general heads (*g*): —

First, Real evidence, or evidence from things.

Secondly, Evidence derived from the *antecedent* conduct or position of the accused. Under this head come motives to commit the offence, means and opportunities of committing it, preparations for the commission of, and previous attempts to commit it, declarations of intention, and threats to commit it.

Thirdly, Evidence derived from the *subsequent* conduct of the accused. To this class belong sudden change of life or circumstances, silence when accused, false or evasive statements made by the accused, suppression or eloignment of evidence, forgery of exculpatory evidence, evasion of justice, by flight or otherwise, tampering with officers of justice, and fear, indicated either by passive deportment or a desire for secrecy.

Fourthly, Confessorial evidence.

Each of these has of course its peculiar probative force and infirmative hypotheses. The subject of real evidence has been treated in a former part of this work (*h*); the suppression and eloignment of evi-

(*g*) The author deems it common justice to acknowledge the large use he has made throughout this sub-section of the 5th Book of Bentham's Treatise on Judicial Evidence, where he treats of circumstantial evidence. In that part of his work, we have the full benefit of the strong sense and observant mind of the writer, comparatively free from the peculiar notions and erroneous views which pervade and disfigure so much of the rest.

(*h*) Bk. 2, pt. 2.

dence and the forgery of exculpatory evidence have been mentioned under the head of presumptions in disfavour of a spoliator (*i*); while silence under accusation, and false or evasive statements, as likewise confessorial evidence, will be reserved for the title of self-regarding evidence (*k*), to which they most properly belong. The others will now be treated in their order.

§ 453. I. MOTIVES TO COMMIT THE OFFENCE, AND MEANS AND OPPORTUNITIES OF COMMITTING IT. — A mischievous event being supposed to have been produced, and Titius being suspected of having been concerned in the production of it, "What could have been his *motive?*" says a question, the pertinency of which will never be matter of dispute (*l*). The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Almost every child has something to gain by the death of his parents, but rarely on the death of a parent is parricide even suspected (*m*). Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value; or where a man, accused of the murder of his wife, has previously formed an adulterous connection with another woman, &c. On the other hand, the absence of any *apparent* motive is always a fact in favour of the accused; although the existence of motives, invisible to all except the person who is influenced by them, must not be overlooked. The infirmative hypotheses affecting *motives* to commit an offence are applicable also to *means* and *opportunities* of committing it (*n*); and some unhappy cases show the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secure as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house to an upper window of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them (*o*).

(*i*) *Suprà*, sect. 2, sub sect. 8.
(*k*) *Infrà*, ch. 7.
(*l*) 3 Benth. Jud. Ev. 183.
(*m*) *Id.* 187, 188.
(*n*) *Id.* 189.
(*o*) Stark. Ev. 865, 4th Ed. For another instance, see Burrill, Circ. Evid. 371.

§ 454. II. Preparations for the commission of an offence, and previous attempts to commit it. — Under the head of *preparations* for the commission of an offence, may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal (*p*). Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature, for preventing discovery or averting suspicion of the former (*q*). In addition to these preparations of the second order, may be imagined preparations of the third and fourth orders, and so on (*r*).

§ 455. Of all species of preparations, those which are resorted to for the purpose of averting suspicion from the criminal require the most particular notice. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed for the murder of his patron and friend, Isaac Blight. The prisoner and deceased lived in the same house; and the latter, while sitting one evening in his parlour, was shot by a pistol from an unseen hand. A strong and well-connected chain of circumstantial evidence fixed Patch as the murderer; in the course of which it appeared that, a few evenings before that on which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the room in which the family when at home usually passed their evenings. This shot the prisoner represented at the time as having been fired at him; but there was every reason to believe that it must have been fired by himself, in order to induce the deceased and his servants to suppose that assassins were prowling about the building (*s*). Murderers are frequently found busy, for some time previous to their crime, in spreading rumours that from ill-health, imprudence, or other cause, the existence of their victim is likely to be short (*t*); others prophesy impending mischief to him in more defined terms; and those in the lower walks of life throw out dark and mysterious hints as to his approaching death (*u*). The object of all this is to prepare the minds of his friends and neighbours for the event, and by diminishing surprise, to prevent investigation into its cause. *Previous attempts* to commit an offence are closely

(*p*) 3 Benth. Jud. Ev. 63, 64.
(*q*) *Id.* 64.
(*r*) *Id.* 65.
(*s*) Trial of Richard Patch for the murder of Isaac Blight, London, 1806. For another instance, see *R.* v. *Courvoisier*, Wills, Circ. Ev. 241, 3rd Ed.
(*t*) 3 Benth. Jud. Ev. 65, 66; Wills, Circ. Ev. 79, 3rd Ed.
(*u*) Stark. Ev. 850, 4th Ed.

allied to *preparations* for the commission of it, and only differ in being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short (*x*).

§ 456. The probative force, both of preparations and previous attempts, manifestly rests on the presumption that an intention to commit the individual offence was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But however strong this presumption may be when the corpus delicti has been proved, it must be taken in connection with the following infirmative hypotheses: 1.° The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or if criminal, directed towards a different object (*y*). 1. Thus a person may be poisoned; and another, innocent of his death, may, a short time before, have purchased a quantity of the same poison, for the purpose of destroying vermin. So predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that the accused was really speaking the conviction of his own mind, without any criminal intention: prophecies of death are much more frequently the offspring of superstition than of premeditated assassination. 2. As an example of criminal intention with a different object, murder by fire-arms is not uncommon; and a person innocent of a murder might, a short time previous to its commission, have purchased a gun for the purpose of poaching, or even have stolen one which is found in his possession. So A. might purchase a sword or pistol for the purpose of fighting a duel with B.; and before the meeting took place, the weapon might be purloined or stolen by C., in order to assassinate D.

§ 457. 2°. But even when preparations have been made with the intention of committing, or previous attempts have been made to commit, the identical offence charged, two things remain to be considered (*z*): 1. The intention may have been changed or abandoned before execution. Until a deed is done, there is always a *locus pœnitentiæ;* and the possibility of a like criminal design having been harboured and carried into execution by other persons must not be overlooked. 2. The intention to commit the crime may have persisted throughout, but the criminal may have been anticipated by others. A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an innkeeper. In the middle of

(*x*) 3 Benth. Jud. Ev. 69.
(*y*) *Id.* 72.
(*z*) *Id.* 74.

the night, a guest in his house was found murdered in bed, his host standing over the bed with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody; and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was convicted and executed for this murder; but it afterwards appeared that it had been committed by another person, immediately before Bradford came into the room of the deceased. He had, however, entered the room with a similar design; the symptoms attributed to consciousness of guilt were partly attributable to surprise at finding his purpose anticipated; while the blood on his hand and on the knife was occasioned by his having, when turning back the bed-clothes to see if the deceased were really dead, dropped the knife on the bleeding body (*a*).

§ 458. III. Declarations of intention to commit an offence, and threats to commit it. — Next to preparations and attempts follow declarations of intention, and threats to commit the offence which is found perpetrated. Most of the infirmative hypotheses applicable to the former are incident to those now under consideration; and these, besides, have some which are peculiar to themselves. 1st, The words supposed to be declaratory of criminal intention may have been misunderstood, or misremembered. 2ndly, It does not necessarily follow because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. The words may have been uttered through bravado, or with the view of annoying, intimidating, extorting money, or for some other collateral object. 3rdly, Besides, another person really desirous of committing the offence may have profited by the occasion of the threat to avert suspicion from himself (*b*). 4thly, It must be remembered that a threat or declaration of this nature tends to frustrate its own accomplishment. By threatening a man you put him upon his guard, and

(*a*) Theory of Pres. Proof, Append. Case 7.

(*b*) A curious instance of this is related by a very old French authority. A woman of extremely bad character, one day in the open street, threatened a man who had done something to displease her that she would "get his hams cut across for him before long." A short time afterwards he was found dead, with his hams cut across, and several other wounds. This was of course sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. Shortly afterwards, however, a man who had been taken into custody for some other offence declared that she was innocent, and that the murder had been committed by another man of whom he was the accomplice. That person was immediately arrested, and confessed the whole truth as follows: That happening to be passing in the street when the threat was uttered, he took advantage of that circumstance to make away with the murdered man, well assured that the woman's bad character would immediately direct towards her the attention of the officers of justice. Papon, Arrests, liv. 24, tit. 8, arrest 1; cited, not very accurately, in the Causes Célèbres, vol. 5, p. 437, Ed. Richer, Amsterdam, 1773.

force him to have recourse to such means of protection as the law, or any extra-judicial powers which he may have at command, may be capable of affording to him (*c*). "Still, however," as has been judiciously observed, "by the testimony of experience, criminal threats are but too often, sooner or later, realised. To the intention of producing the terror, and nothing but the terror, succeeds, under favour of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief, and (in pursuance of that intention) the mischievous act" (*d*). "Threats," observes a recent author (*e*), "are often disregarded and despised: it is only the more timid dispositions that are influenced by them; and in most minds there is an unwillingness, even if fear be felt, to manifest it by any outward acts or cautionary proceedings. To this contempt of the mere language of an enemy, and the exposure of person which has followed, have many courageous persons notoriously owed their deaths. And it may be that the threatener, in these cases, has counted, in advance, upon this very circumstance."

§ 459. IV. CHANGE OF LIFE OR CIRCUMSTANCES. — Having examined the probative force of criminative facts existing before, though perhaps not discovered until after, the perpetration of the offence, we proceed to consider those occurring subsequent to it. Among these the first that naturally presents itself to notice is a change of life or circumstances not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth (*f*), and the like, the civil law held that the suddenly becoming rich was not even primâ facie evidence of dishonesty against a guardian (*g*); and in our criminal courts it is not, when standing alone, any ground for putting a party on his defence (*h*).

§ 460. V. EVASION OF JUSTICE. — By "evasion of justice" is meant the doing some act indicative of a desire to avoid or stifle judicial inquiry into an offence of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighbourhood; removing himself, his family, or his goods, to another place; keeping concealed, &c. To these must be added the kindred acts of bribing or tampering with officers of

(*c*) 3 Benth. Jud. Ev. 78.
(*d*) *Id.*
(*e*) Burrill, Circ. Ev. 342.
(*f*) See *Burdock's case*, Appendix, No. 1, Case 2.
(*g*) Cod. lib. 5, tit. 51, l. 10.
(*h*) 2 Ev. Poth. 345.

justice to induce them to permit escape, suppress evidence, &c. All these afford a presumption of guilt, more or less cogent according to circumstances.[1]

§ 461. The fact that about the time of the commission of an offence a person accused or suspected of it left the country, changed his home, &c., is only presumptive evidence of an intention to escape being rendered amenable to justice for that offence: a man may change his abode for health, business, or pleasure. In order to estimate the weight due to this presumption, it is most important to inquire into the party's general mode of life. In the case of a mariner, carrier, itinerant vendor, or itinerant handicraft, the inference of guilt from change of place might amount to little or nothing (*i*). Moreover, the object in absconding might be to avoid civil process, or inquiry into some other offence (*k*).

§ 462. But even the clearest proof that the accused absented himself to avoid the actual charge against him, although a strong circumstance, is by no means conclusive evidence of guilt. Many men are naturally of weak nerve, and under certain circumstances the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious though inconclusive facts will be adduced in evidence against him; he may feel his inability to procure legal advice to conduct his defence, or to bring witnesses from a distance to establish it; he may be fully assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him. Add to all this that, even under the best-regulated judicial system, more or less vexation must necessarily be experienced by all persons who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive. These considerations are entitled to weight at all times, and in all places; but in addition to them, the nature and character of the tribunal before which, and of the administration of justice in the country where the trial is to take place, must never be lost sight of. To say nothing of those cases where the tribunal lies under just suspicion of positive corruption, partiality, or prejudice, the principles on which it avowedly acts may in themselves be sufficient to deter any man from voluntarily placing himself in its power. In the

(*i*) 3 Benth. Jud. Ev. 176. (*k*) *Id.* 180.

[1] So of the American cases. Plummer *v.* Com., 1 Bush (Ky.), 76; Dean *v.* Com., 4 Gratt. 541, acc.

case, for instance, of those tribunals which act on the maxims, "In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi" (*l*); "Hæreseos suspectus, tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit" (*m*); or of others which, on slight evidence, would, in order to extract confession, torture a suspected man so as perhaps to disable him for life (*n*); or of others acting on the principle laid down by certain eminent moralists, that it is justifiable to deliver up to capital punishment individuals whose guilt is not indisputably proved, on the ground that those who fall by a mistaken sentence may be considered as falling for their country (*o*), — is it matter of wonder that innocent persons should fly to avoid the impending danger? Would it not be more surprising to find any waiting to meet the course of justice?

§ 463. But there are other considerations, independent of tribunals or their practice, which might powerfully influence a man to seek to avoid being tried for a suspected crime. The case may have attracted much public attention, and a strong popular feeling may prevail against the supposed criminal. And here the occasional misconduct of the public press must not be overlooked. When facts have come to light, indicating the probable commission of some crime conspicuous for its peculiarity or atrocity, the press of this country in days gone by too often forgot the honourable position it ought to occupy, and the fearful responsibility consequent on the abuse of its power. Under colour of a horror of the crime, but more probably with the view of increasing the sale of a newspaper by pandering to excited curiosity and morbid feeling, a course has been taken, calculated to deprive of all chance of a fair trial, the unfortunate individual who was suspected of it. For weeks or months previous, his conduct and character had been made the continual subject of condemnatory discussion in the public prints, and in all places within the sphere of their influence. Circumstantial descriptions of the way in which the crime was committed, and sometimes actual delineations of it, with the accused represented in the very act; elaborate histories of his past life, in which he has been spoken of as guilty of crimes innumerable; minute accounts of his conduct in the retirement of his cell, and while under examination; and expressions of wonder and rage that he has had the audacity to withhold a confession of his guilt, — were daily and hourly poured forth. In one case, while certain parties were awaiting their trial for murder, the whole scene of the murder, of which, of course, they were assumed to be the perpetrators, was

(*l*) Introd. pt. 2, § 49, p. 36.

(*m*) Devot. Inst. Canon. lib. 3, tit. 9, § 31, Ed. 1852.

(*n*) See any treatise on the practice of the civil law in criminal cases.

(*o*) See Introd. pt. 2, § 49.

dramatised, and represented to a metropolitan audience (*p*). Misconduct of this kind, or at any rate to this degree, is now almost unknown; and if it were attempted, it would soon be put down by the law, if not by the spontaneous action of public opinion.

§ 464. We must not, however, dismiss this subject, without observing that cases sometimes occur, where an offence is committed under the prospect of impunity, offered by a change of place resolved on from other motives.

§ 465. Few things distinguish an enlightened from a rude and barbarous system of judicature more than the way in which they deal with evidence. The former *weighs* evidence; the latter, conscious perhaps of its inability to do so with effect, or careless of the consequences of error, sometimes rejects the evidence altogether, and at others converts certain pieces of evidence into rules of law, by investing them with conclusive effect, merely because their probative force has in general been found to be considerable. Our ancestors, observing that guilty persons commonly fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim, "Fatetur facinus qui fugit judicium" (*q*). Under the old law, a man who fled to avoid being tried for treason or felony forfeited all his goods and chattels, even though he were acquitted (*r*); and in such cases the jury were charged to inquire, not only whether the accused were guilty of the offence, but also whether he had fled for it, and if so what goods and chattels he had. This practice was not formally abolished until the 7 & 8 Geo. 4, c. 28, s. 5. Nor was the notion peculiar to the English law. We find traces of it among the earlier civilians, who lay down, "Reus per fugam sui, penè accusator existit" (*s*). Among the later civilians (*t*), as well as among ourselves in modern times, more correct views have prevailed; and the evasion of justice seems now nearly, if not altogether, reduced to its true place in the administration of the criminal law; namely, that of a *circumstance*, — a fact which it is always of importance to take into consideration; and which, combined with others, may supply

(*p*) On the 7th of January, 1824, John Thurtell and Joseph Hunt were tried and convicted on unquestionable evidence for the murder of William Weare, on the 17th of October, 1823. The murder was dramatised, and the piece played at the Surrey Theatre on the 17th of November preceding the trial.

(*q*) 5 Co. 109 b; 11 Co. 60 b; Jenk. Cent. 1, Cas 80.

(*r*) Co. Litt. 373 a & b; 5 Co. 109 b; 19 How. St. Tr. 1098. According to some authorities, indeed, this forfeiture was inflicted on the ground that the flight was a contempt of the law, and a substantive crime in itself. Plowd. 262; 19 How. St. Tr. 1098.

(*s*) Voet. ad Pand. lib. 22, tit. 3, n. 5; Novel. 53, cap. 4.

(*t*) Mascard de Prob. Concl. 499; Matth de Prob. cap. 2, n. 69; Voet. *in loc. cit.*

the most satisfactory proof of guilt, although, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

§ 466. VI. Fear indicated by passive deportment, &c. — The emotion of *fear*, indicated by passive deportment when a party is accused, or perceives that he is suspected of an offence, is sometimes relied on as a criminative circumstance.[1] The following physical symptoms may be indicative of fear: "Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice," &c. (*u*); and as the probative force of each of these depends on the correctness of the inference that the symptom has been caused by fear of detection of the offence imputed, two classes of infirmative hypotheses naturally present themselves. 1st, The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, &c. With respect to the first, for instance, "blushing," the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2ndly, The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial inquiry may bring down suspicion or punishment (*x*); or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be produced to him or them (*y*). So the apprehension of condemnation and punishment, though innocent, or of vexation and annoyance from prosecution, is a circumstance, the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the forms of criminal procedure in the country where the trial is to take place (*z*). Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection (*a*). *E. g.*, a habitual thief is taken into custody for a theft; that he should show symptoms of fear is natural enough; and confounding one of his exploits with another, he may (especially if the time of the supposed offence be very remote)

(*u*) 3 Benth. Jud. Ev. 153.
(*x*) *Id.* 157.
(*y*) *Id.*
(*z*) *Suprà*, § 462.
(*a*) 3 Benth. Jud. Ev. 157.

[1] The rule is the same in the United States. Tyner *v.* State, 5 Humph. 383; Johnson *v.* State, 17 Ala. 618; Com. *v.* Kenney, 12 Metc. 235, acc.

imagine himself to recollect a theft, in which, in truth, he bore no part (*b*).

Closely allied to this subject is the inference of the existence of alarm, and through it of delinquency, derived from *confusion of mind;* as expressed in the countenance, or by discourse, or conduct (*c*). This, however, like the former, is subject to the infirmative hypotheses, — 1st, That the alarm may be caused by the apprehension of some other crime, or some disagreeable circumstance coming to light (*d*); 2nd, Consciousness on the part of the accused or suspected person that, though innocent, appearances are against him (*e*).

§ 467. VII. Fear indicated by a desire for secrecy. — The presence of fear may be evidenced in another way; namely, by acts showing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others, for doing that which, but for the criminal design, would naturally have been done in a place open to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful action, &c. (*f*). Acts such as these are, however, frequently capable of explanation. 1st, It is perfectly possible that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned (*g*). The lovers of servants, for instance, are often mistaken for thieves, and vice versâ (*h*). 2ndly, The design, even if criminal, may be criminal with a different object, and of a degree less culpable than that attributed (*i*); as, for instance, where a man, with a view of making sport by alarming his neighbours, dresses himself up to pass for a ghost (*k*).

§ 468. The subject of the present section may fairly be termed the Romance of Jurisprudence, and is indeed one of the few parts of that matter-of-fact science in which it becomes necessary, under penalty of the gravest consequences, to guard against illusions of the imagination. Unfortunately for the interests of society, the true principles on which presumptive evidence rests have not always been under-

(*b*) 3 Benth. Jud. Ev. 158.

(*c*) *Id.* 149.

(*d*) There is a well known case of a man, who, being wrongly suspected of harbouring a person accused of a State crime, had his house, and even his bed-chamber as he was lying in bed, searched by the officers of justice. He had at the moment in bed with him a female, whose reputation would have been ruined by the disclosure; and confusion, more or less, he must have betrayed. His presence of mind saved himself and her, by uncovering enough of her person to indicate the sex, without betraying the individual. See Benth. Jud. Ev. 151 (n.).

(*e*) 3 Benth. Jud. Ev. 151.

(*f*) *Id.* 160, 161.

(*g*) *Id.* 162.

(*h*) *Id.*

(*i*) *Id.*

(*k*) *Id.* 163.

stood or adverted to by those intrusted with power; and the judicial histories of every country supply melancholy instances where the safety of individuals has been sacrificed to the ignorance, haste, or misdirected zeal of judges and jurymen dealing with this mode of proof. The consequence has been that a prejudice has arisen against it, so that a declamation on the dangers of convicting on presumptive evidence is ever sure of the ready ear of a popular assembly. Viewed either in a legislative or professional light, such an argument is scarcely deserving serious refutation. No form of judicial evidence is infallible: however strong in itself, the degree of assurance resulting from it amounts only to an indefinitely high degree of probability (*l*); and perhaps as many erroneous condemnations have taken place on false or mistaken direct testimony as on presumptive proof (*m*). As every one must be aware, positive direct testimony frequently has its origin in wilful falsehood. The most heinous offences, murder not excepted, have occasionally been committed with the view of afterwards accusing innocent persons of them, in order to obtain a reward held out for the conviction of offenders. At Dublin, in January, 1842, one John Delahunt was convicted and executed for an offence of this nature (*m'*). The English government has for many years discontinued the offering rewards for the detection of crimes on the ground that persons committed crimes for the purpose of obtaining the rewards by false accusations of the innocent; and the Home Office, though urgently requested to offer a reward for the discovery of a series of murders of women in Whitechapel in 1888, steadily refused to revive the practice on this ground. Indeed, the most unhappy instances are those where the tribunal has been deceived by suspicious circumstances, casual or forged, coupled with false direct testimony; for in such cases the two species of evidence (though each is fallacious in itself) prop up each other. And as in the most important transactions of life, in all the moral, and most of the physical sciences, we are compelled to rely almost exclusively on probable or presumptive reasoning (*n*), it seems difficult to suggest why a higher degree of assurance should be required in judicial investigations, even were such assurance attainable.

§ 469. But while we condemn this perhaps not unnatural error, what must be said of one of an opposite kind, infinitely more mischievous because promulgated by authority which we are bound to respect, —

(*l*) See Introd. pt. 1, §§ 7 and 27; bk. 1, pt. 1, § 95.

(*m*) For cases of mistaken identity, see *infrd*, ch. 6.

(*m'*) See also *R.* v. *M'Daniel and others*, O. B. Sess. 1755, reported in Foster's C. L. 121.

(*n*) Locke on the Human Understanding, bk. 4, ch. 14.

namely, the setting presumptive evidence above all other modes of proof, and investing it with infallibility? Juries have been told from the bench, even in capital cases, that "where a violent presumption *necessarily* arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because *facts cannot lie*" (*o*). Numerous remarks might be made on this strange dogma; the first of which that presents itself is, that the moment we talk of anything following as a *necessary* consequence from others, all idea of *presumptive* reasoning is at an end (*p*). Secondly, that even assuming the truth of the assertion that facts or circumstances cannot lie, still so long as witnesses and documents, by which the existence of those facts must be established (*q*), can lie, or even honestly misrepresent, so long will it be impossible to arrive at infallible conclusions from circumstantial evidence. But without dwelling on these considerations, look at the broad proposition, "*facts cannot lie.*" Can they not, indeed? When, in order to effect the ruin of a servant, his box is opened with a false key, and a quantity of goods stolen from his master is deposited in it; or, where a man is found dead, with a bloody weapon lying beside him, which is proved to belong to a person with whom he has had a quarrel a short time before, and foot-marks of that person are traced near the corpse; but the murder has in reality been committed by a third person who, owing a spite to both, put on the shoes of one of them and borrowed his weapon to kill the other, do not the circumstances *lie*, — wickedly, cruelly *lie* (*r*)? There is every reason to fear that a blind reliance on the dictum, "facts cannot lie," has occasionally exercised a mischievous effect in the administration of justice.

§ 470. In dealing with judicial evidence of all kinds, ignorance dogmatises, science theorises, sense judges. The right application of presumptive, as of other species of evidence, depends on the intelligence, the honesty, and the firmness of tribunals. To convict, at least in capital cases, on the strength of a single circumstance, is always dangerous; and it has been justly observed, that where the

(*o*) Per Legge, B., in the case of *Mary Blandy*, 18 How. St. Tr. 1187. See also, per Buller, J., in *Donellan's case*, Warwick Sp. Ass. 1781, Report by Gurney; per Mounteney, B., in *Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. 1430; Gilb. Ev. 157, 4th Ed.; Paley's Moral and Political Philosophy, bk. 6, ch. 9; and the Works of Chancellor d'Aguesseau, tom. 12, p. 647.

(*p*) See *suprà*, § 468.

(*q*) Domat, Lois Civiles, part. 1, liv. 3, tit. 6, Préamb.; Theory of Presumptive Proof, pp. 23 and 28.

(*r*) A bad case of this latter kind is given in the Theory of Presumptive Proof, Append. Case 10. See also the case of *Adrien Doué*, 5 Causes Célèbres, 444, Ed. Richer, Amsterdam, 1773; and *suprà*, bk. 2, pt. 2, on Real Evidence. See also the story narrated by Cicero, de. Inv. lib. 2, s. 4, cited Ram on Facts, 97, and the quotation from "Cymbeline" in Goodeve on Evidence, 43, 44.

criminative facts of a presumptive nature are more numerous, most of the erroneous convictions which have taken place have arisen from relying too much on general appearances, when no inchoate act approaching the crime has been proved against the accused (*s*).

§ 471. But the stream, and even the source of justice, may be poisoned by causes irrespective of the imbecility of laws or the errors of tribunals. One of these, from the influence it has frequently exercised in capital cases, and especially when the proof against the accused has been presumptive, deserves particular attention. We allude to the prevalence of superstitious notions, which, although much diminished by the march of enlightenment and civilisation, is far from extinct. The days are, it is true, gone by when supernatural agency was allowed to supply chasms in a chain of proof; when persons were condemned to death on the supposed testimony of apparitions (*t*), or because the corpse bled at their touch (*u*); but the *spirit* of superstition is ever the same. There is a notion still very prevalent among the lower orders of society (though not by any means confined to them), that no person would venture to die with a lie in his mouth; and, consequently, that when a criminal awaiting his execution, especially a criminal who evinces religious feeling, makes a solemn protestation of his innocence, no alternative remains but to believe him, and that the tribunal by which he was condemned was either corrupt or mistaken. It is difficult to imagine a fallacy more dangerous to the peace of society than this. Conceding that such protestations are always deserving of attention from the executive, what is there to invest them with any conclusive effect, in opposition to a chain of presumptive evidence the force of which falls short only of mathematical demonstration? The criminal, it is argued, is standing on the confines of a future world. True; but perhaps he does not believe in its existence. Take, however, the strongest case. Suppose his faith undoubted, that he has attended most assiduously to every religious duty, and displayed up to the

(*s*) Theory of Presumptive Proof, 58, 59.

(*t*) At a trial in 1754, for murder, before the Court of Justiciary in Scotland, two witnesses were allowed to swear to their having seen a ghost or spirit, which they said had told them where the body was to be found, and that the panels (*i. e.*, the accused) were the murderers. Burnett's Crim. Law of Scotland, 529.

(*u*) In this country, in the case of Mary Norkott and others, who were tried at the bar of the King's Bench, in the 4 Car. I. (1628–1629), on an appeal of the murder of Jane Norkott, wife of one of the accused, two respectable clergymen swore that, the body having been taken out of the grave and laid on the grass thirty days after death, and one of the parties required to touch it, "the brow of the dead, which before was of a livid and carrion colour, began to have a dew, or gentle sweat, arise on it, which increased by degrees, till the sweat ran down in drops on the face," &c. 14 How. St. Tr. 1324, reported by Serjeant Maynard.

very moment of execution a becoming sense of contrition for past offences in general, but that he solemnly declares his innocence of the crime for which he is about to suffer, must he necessarily be believed? Is there nothing else to be taken into consideration? He reflects on the obloquy which an avowal of his guilt will bring on his family and connections, — that its effect will be to expose them to the finger of scorn for generations to come, or perhaps to reduce them to poverty, or drive them to self-expatriation. With all this present to his mind we need not be astonished if a criminal, whose notions of morality were perhaps never very clear, should, particularly when regard for his own memory is taken into the account, delude himself into the belief that a false protestation of innocence, made to avert so much evil, is an offence of an extremely venial nature, if not an act deserving positive approbation. We must not forget the position in life and the character of the persons who commonly make these protestations, or expect them to see, with the eyes of philosophy, the extent of the mischief which will inevitably result from a conviction in the public mind that an innocent man has been sacrificed by a corrupt or mistaken sentence. The immediate benefit to themselves, their families, or neighbours forms the boundary line of their vision, while the great interests of society are lost in a distant horizon. The judicial histories of all countries furnish examples of the most solemn denunciations of the unjustness of their judges, or the perjury of the witnesses against them, made by criminals the blackness of whose deeds and the justice of whose condemnation no rational being could doubt; and when we recollect the numerous instances which have occurred of persons making groundless confessions of *guilt* (*x*), we shall cease to be surprised at false asseverations of *innocence*.

(*x*) See *infrà*, ch. 7.

CHAPTER III.

PRIMARY AND SECONDARY EVIDENCE.

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§ 472. The exaction of *original evidence* is unquestionably one of the most marked features of English law (*a*). And in the present chapter we propose to consider the application of this principle to the proof of instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least primâ facie receivable in evidence. Such are said to be the "*primary* evidence" of their own contents, and the term "*secondary* evidence" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, &c. It is a general and well-known rule that no secondary evidence of a document can be received until an excuse, such as the law deems sufficient, is given for the non-production of the primary.[1] Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge; and if this depends on a disputed question of fact, he must decide it (*b*).

(*a*) See Introd. pt. 1, § 29, and bk. 1, pt. 1, §§ 87–89.

(*b*) *Suprà*, bk. 1, pt. 1, § 82; *Harvey* v. *Mitchell*, 2 Moo. & R. 366; *Elmes* v. *Ogle*, 15 Jur. 180.

[1] See § 215, n. 1, C. III. (*a*), *supra*.

§ 473 (*c*). And here the important question presents itself, — is this principle confined to evidence *in causâ*, or does it extend to evidence *extrà causam?* The following questions were put by the House of Lords, and the following answers given by the judges, during the proceedings against Queen Caroline in 1820 (*d*). "First, whether, in the courts below, a party on cross-examination would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?" "Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?" "Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?" The first of these questions the judges answered in the negative; on the ground that "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining

(*c*) Sections 474–480, which were mainly devoted by the author to a forcible attack on the answers of the judges, are wholly omitted in the present edition.

(*d*) 2 B. & B. 286–291.

counsel may put the court in possession only of a part of the contents of the written paper; and thus the court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part." The first part of the second question — namely, "whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?" — the judges thought should be answered by them in the affirmative in that form; but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given; namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other. To the first part of the third question Lord Chief Justice Abbott answered as follows: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. In delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer your lordships any new rule of evidence, now, for the first time, introduced by them; but that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England; namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." To the latter part of the question he returned for answer, "the judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that if the counsel who is cross-examining suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, *that* becomes an excepted case in the courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The foregoing questions and answers were followed by this (*e*): "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?" Lord Chief Justice Abbott delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, — namely, 'whether a witness has made such and such representation,' — has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked whether there is an agreement for a certain price for a certain article, — an agreement for a certain definite time, — a warranty, — or other matter of that kind being a matter of contract. And when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. — My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, — namely, the want of an established practice referring to such a question by counsel, — yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands, and ask him whether it be his writing), considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions

(*e*) 2 B. & B. 292–294.

relating to contracts or agreements, we each of us think that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House that, by dividing the question into parts, I mean, that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, — that is, whether the witness had said so and so, — the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."

§ 481 (*f*). The answers of the judges in *Queen Caroline's case* — opposed, as they were, to the most elementary principles of evidence — having for years been denounced by writers on the subject, and latterly by the Common Law Commissioners of 1850, at length received the condemnation of the Legislature. The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 24, following almost verbatim the recommendation of those commissioners, enacts: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." By sect. 103, the enactments in this section are extended to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, sects. 1 & 5, extends them to criminal cases.

§ 482. It has been already stated, that when the absence of the primary source of evidence has been accounted for, secondary evidence is receivable (*g*). The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost; or that it is in the possession of the adversary, who does not

(*f*) As to omission from this edition of ss. 474–480, see p. 428, n. (*c*), *ante*.

(*g*) *Suprà*, § 472. "Quumque ex ea definitione adpareat, instrumenta rerum gestarum fidei ac memoriæ causâ confici: facile patet, eis amissis, jus non exspirare, nec ullam obligationem perimi, dum alia supersit probandi ratio." Heinec. ad Pand. pars 4, § 133. See also Mascard. de Prob. Concl. 480, n. 4.

produce it after due notice calling on him so to do; or in that of a party privileged to withhold it, who insists on his privilege; or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it. Whether a sufficient foundation has been laid for admitting secondary evidence, is often a matter of nicety, and depends on whether sufficient proof has been given of the destruction or loss of the document; whether a notice to produce is required, — as in many cases the proceedings amount to constructive notice, and in others notice to produce is dispensed with by statute (*h*), — and if so, whether the notice given is sufficient in its terms, and has been given in proper time, &c. There are, however, some general principles which should always be borne in mind. First, Whether sufficient search has been made for a document, depends much on its nature and the circumstances of the case (*i*), — as a useless document may be presumed to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important one. This subject is well illustrated by *Gathercole* v. *Miall* (*j*), which was an action for a libel in a newspaper called "The Nonconformist." In order to prove the circulation of the libel, a witness was called who said he was president of a literary institution, which consisted of eighty members; that a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it had been lost or destroyed. Under these circumstances, the judge at nisi prius held that secondary evidence of the contents of the paper was admissible. A new trial having been moved for on the ground that this evidence was improperly received, the court held the ruling to be right. Alderson, B., in delivering his judgment, says: (*k*) "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers; I cannot find it,' surely that would be sufficient. So, with respect to an old newspaper which had

(*h*) *E. g.*, 17 & 18 Vict. c. 104, s. 165.

(*i*) *R.* v. *East Farleigh*, 6 D. & Ryl. 147, *Gathercole* v. *Miall*, 15 M. & W. 319; *Richards* v. *Lewis*, 15 Jur. 512, *R.* v. *Braintree*, 1 E. & E. 51; *Quilter* v. *Jorfs*, 14 C. B N. S. 747.

(*j*) 15 M. & W. 319.

(*k*) *Id.* 335.

been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had bonâ fide endeavoured to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper." Secondly, According to some authorities, the object of a notice to produce is not merely to enable the party served to have the document in court; but also that he may be enabled to prepare evidence to explain, nullify, or confirm it (*l*). This notion has, however, been overruled, after argument and full review of the cases, by the Court of Exchequer, in a case of *Dwyer* v. *Collins* (*m*); in which it was held, that the sole object of such a notice is to enable the party to have the document in court to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence. "If," said Parke, B., in delivering the judgment of the court, "this (*i. e.*, the reason suggested by the above authorities) be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the case and the document itself and its bearing on the cause." And it was accordingly held in that case, that where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice; and in the event of his refusing, the opposite party may give secondary evidence.

§ 483. The expression that secondary evidence of a document is receivable must not be understood to mean that conjectural, or any other form of illegal evidence of it, will be received. Secondary evi-

(*l*) 1 Stark. Ev. 404, 3rd Ed; *Cook* v. *Hearn*, 1 Moo. & R. 201; *Exall* v. *Partridge*, cited *arguendo* in *Doe* d. *Wartney* v. *Grey*, 1 Stark 283.

(*m*) 7 Exch. 639: 16 Jur. 569.

dence must be *legitimate* evidence, inferior to the primary solely in respect of its derivative character. Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first copy has been satisfactorily explained (*n*).[1] So, previous to the 14 & 15 Vict. c. 99, s. 2, where a document was lost, a copy of it made by the party to the suit was not admissible, unless proved by evidence aliundè to be accurate; for as he was not a competent witness for himself, so what he wrote could not be evidence for him (*o*).

And here it is of the utmost importance to remember that there are no *degrees* of secondary evidence (*p*).[2] A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even wilfully withholding some other, likely to be more satisfactory, is only matter of observation for the jury. Thus, the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court. This rule, so elementary in its nature, was not established until the case of *Doe* d. *Gilbert* v. *Ross* (*q*) in 1840; previous to which, however, various dicta were to be found on the subject, and the prevailing opinion was rather the other way (*r*). But that decision is in perfect accordance with the general principles of evidence, and a contrary doctrine would open the widest door to fraud and chicane. At the trial of the case on the circuit, in order to prove, by secondary evidence, the contents of a marriage settlement, — a copy which was tendered having been rejected for want of a stamp, — a short-hand writer's notes of a former trial, at which the settlement was proved, were offered and received by the judge. The jury having found for the plaintiff, it was objected before the court in banc that this evidence ought not to have been received, especially as it appeared that a copy of the settlement was in existence; and several of the previous dicta were cited. The court, however, refused even a rule to show cause on this point, Parke, B., observing: "As soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence that there is any attested copy, or better species of secondary evidence

(*n*) *Reeve* v. *Long*, Holt, 286; *Anon.*, Skinn. 174; *Liebman* v. *Pooley*, 1 Stark. 167; *Everingham* v. *Roundell*, 2 Moo. & R. 138; Gilb. Ev. 9, 4th Ed.

(*o*) *Fisher* v. *Samuda*, 1 Camp. 192–193.

(*p*) *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; *Hall* v. *Ball*, 3 Scott, N. R. 577; *Brown* v. *Woodman*, 6 Car. & P. 206.

(*q*) 7 M. & W. 102.

(*r*) The cases were collected by the author in the Monthly Law Mag., vol. 4, p. 265.

[1] It is doubtful whether this is law in America Winn *v.* Patterson, 9 Pet. 663; Goodrich *v.* Weston, 102 Mass. 362, *contra.*

[2] See § 215, n. 1, C. III. (*d*), *supra.*

behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shown from other sources that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power."

§ 484. There are several exceptions to the rule which requires primary evidence to be given. The following are the principal: First, where the production of it is physically impossible, as where characters are traced on a rock; or, secondly, where it would be highly inconvenient on *physical* grounds; as where they are engraven on a tombstone (*s*), or chalked on a wall or building (*t*), or contained in a paper permanently fixed to it (*u*), &c.

§ 485. 3. The most important and conspicuous exception, however, is with respect to the proof of records (*x*), and other public documents of general concernment (*y*);[1] the objection to producing which rests on the ground of *moral*, not physical inconvenience. They are, comparatively speaking, little liable to corruption, alteration, or misrepresentation, — the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon insure their destruction. For these and other reasons (*z*), the law

(*s*) *Tracy Peerage case*, 10 Cl. & F. 154.

(*t*) *Mortimer* v. *M'Callan*, 6 M. & W. 58, 63 and 68; *Sayer* v. *Glossop*, 2 Exch. 411, per Rolfe, B.; *Bruce* v. *Nicolopulo*, 11 Exch. 129.

(*u*) *R.* v. *Fursey*, 6 C. & P. 84; *Jones* v. *Tarleton*, 9 M. & W. 675.

(*x*) *Dr. Leyfield's case*, 10 Co. 92 b; Doct. Placit. 201, 206; *Leighton* v. *Leighton*, 1 Str. 210.

(*y*) *Mortimer* v. *M'Callan*, 6 M. & W. 58; *Lynch* v. *Clarke*, Holt, 293; 3 Salk. 154. See *infra*.

(*z*) It is said in some books that the reason why records may be proved by a copy is, that no rasure or interlineations shall be intended in them. *Dr. Leyfield's case*, 10 Co. 92 b; B. N. P. 227. But though this may be one reason, it is neither the only nor the principal one. The actual record must be produced on an issue of nul tiel record in the same court; and although it is a præ-

[1] For a statement of the American law relating to public documents, see *infra*, p. 430.

deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings (*a*). Thus it must, at least in general, be in a *written* form, — *i. e.*, in the shape of a copy; and, as already mentioned (*b*), must not be a copy of a copy. In very few, if in any instances, is *oral* evidence receivable to prove the contents of a record or public book which is in existence.

§ 486. The principal sorts of copies used for the proof of documents are, — 1. Exemplifications under the great seal. 2. Exemplifications under the seal of the court where the record is. 3. Office copies, — *i. e.*, copies made by an officer appointed by law for the purpose. 4. Examined copies. An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. The document must be in a character and language that the witness understands (*c*), and he must also have read the whole of it (*d*). According to most authorities, when the latter of the above modes of examination is resorted to, it is unnecessary to call both the persons engaged in it, or that they should have alternately read and inspected the original and copy; for that it ought not to be presumed that any person would wilfully misread a record (*e*). But in a modern case before a committee of privileges of the House of Lords, where, in order to prove a memorandum roll in the Court of Exchequer in Dublin, a witness produced a copy of the roll, which he said he had compared with the original, according to the usual custom of the

sumptio juris et de jure that officers of courts of justice make up their records accurately, and keep them from being tampered with, so strong a presumption could hardly be made in favour of public books and documents not of a judicial character.

(*a*) At first sight this may appear at variance with the maxim that there are no degrees in secondary evidence; but it does not fall within its principle. *E. g.*, a party wants to prove the contents of a *private* document in the possession of his adversary, who refuses to produce it; and for this purpose calls a witness, who offers to state its contents from memory. How unjust would it be if the opposite party could exclude this evidence, by showing that a copy of the document was in existence, which perhaps was even made the day before the trial, with the view of enabling him to raise the objection. See *supra*, § 483. But this reasoning cannot apply in the case of a *public* document, which is kept in a known place, where every one may inspect and obtain a copy of it.

(*b*) *Supra*, § 483.

(*c*) *Crawford Peerage case*, 2 Ho. Lo. Cas. 544–545.

(*d*) *Nelthrop* v. *Johnson*, Clayt. 142, pl. 259.

(*e*) *Rolfe* v. *Dart*, 2 Taunt. 52; *Giles* v. *Hill*, 1 Campb. 471, n.

office, — the clerk in the office holding the original and reading it, while the witness held the copy, without changing hands, — and what he heard the clerk read corresponded with what the witness saw in the copy, the committee held that this practice was incorrect; that the witness could not swear that the document produced was a close copy, and therefore it could not be received; that it was important it should be known that copies must be compared in a different manner, — viz., by changing hands. The same witness having said, on producing a copy of a statute roll, that, besides comparing it in the usual way in the office, he read it with the original himself, the document was received as evidence (*f*). The rule laid down in that case is not, however, always followed in practice. 5. Copies signed and certified as true, by the officer to whose custody the original is intrusted. 6. Photograph copies, — of all others the best for showing any peculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities; as, for instance, when the original is suspected of having been tampered with after the copy has been taken, &c. An examination of the cases, in which these various species of copies may be used as proof of public or other documents, would be altogether foreign to a work like the present; suffice it to say, that there are a few instances where none of them is receivable, and the original must be produced. Of these the principal is, where the gist of a party's action or defence lies in a record of the court where the cause is, and issue is joined on a plea of nul tiel record. Here it is obvious that the reasons which plead so strongly for allowing inferior evidence to prove records, &c. (*g*), do not apply: "Cessante ratione legis, cessat ipsa lex" (*h*).

§ 487. Public documents, though not of a judicial nature, such as registers of births, marriages, and deaths (*i*); the books of the Bank of England (*k*), or of the East India Company (*l*); bank bills on the file at the bank (*m*), &c.,— are, in general, provable by examined copies. And by 14 & 15 Vict. c. 99, s. 14, it is enacted, that "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having

(*f*) *Slane Peerage case*, 5 Cl. & F. 42.

(*g*) *Supra*, § 485.

(*h*) Co. Litt. 70 b.

(*i*) Broom's Maxims, 6th Ed., 153; *Lynch* v. *Clarke*, Holt, 293; *Sayer* v. *Glossop*, 2 Exch. 409. These documents are within 14 & 15 Vict. c. 99, s. 14, cited *infra*. See *R.* v. *Weaver*, L. Rep., 2 C. C. 85.

(*k*) *Mortimer* v. *M'Callan*, 6 M. & W. 58.

(*l*) *Shelling* v. *Farmer*, 1 Str. 646; note to the case of *R.* v. *Lord Geo. Gordon*, 2 Dougl. 593.

(*m*) *Man* v. *Cary*, 3 Salk. 155.

by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer to whose custody the original is intrusted."

§ 488. By several modern Acts of Parliament, special modes of proof are provided for many kinds of records and public documents. By the Documentary Evidence Act, 1868 (*n*), sect. 2, it is enacted as follows: "*Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty or by the privy council, also of any proclamation, order, or regulation issued before or after the passing of this Act, by or under the authority of any such department of the government, or officer as is mentioned in the first column of the Schedule hereto (*o*), may be given in all courts of justice, and in all legal proceedings whatever, in all or any of the modes hereinafter mentioned, that is to say: —

"1. By the production of a copy of the 'Gazette' purporting to contain such proclamation, order, or regulation.

"2. By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

"3. By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the privy council, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true, by the person or persons specified in the second column of the said Schedule in connection with such department or officer (*p*).

(*n*) 31 & 32 Vict. c. 37. Subject to any law that may from time to time be made by the legislature of any British colony or possession, this Act is to be in force in every such colony and possession; sect. 3.

(*o*) *I. e.*: —
The Commissioners of the Treasury;
The Commissioners for executing the Office of Lord High Admiral;
Secretaries of State;
Committee of Privy Council for Trade;
The Poor Law Board.

(*p*) *I. e.*: —
Any Commissioner, Secretary, or Assistant Secretary of the Treasury;
Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners;
Any Secretary or Under Secretary of State;
Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee;
Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."

In statute 14 & 15 Vict. c. 99, the 12th section relates to proof of the register of British vessels. The 13th, which is by far the most important, regulates the proof of previous convictions and acquittals as follows: "Whenever, in any proceeding whatever (*q*), it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

The 8 & 9 Vict. c. 113, s. 3, enacts, "All copies of private and local and personal Acts of Parliament not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the crown or by the printers to either House of Parliament (*r*), or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

The Bankers' Books Evidence Act, 1879 (42 Vict. c. 11), provides for the copies of entries in bankers' books being given in evidence, upon proof that the entries were made in the usual course of business, and that the copies have been examined with them and found correct. The effect of this has been said to be to make the copies admissible, even in cases where the originals would not be, as where a party to a cause produced a copy of an entry in the book of his own bank (*s*). By s. 7, inspection may be obtained of a banking account, but the inspection, when granted, will be limited to the period covered by the matters in dispute in the proceedings (*s'*).

Of these and similar enactments, of which a large number are to be found in the recent statute-books (*t*), it is to be observed, that

(*q*) That is, either civil or criminal. *Richardson* v. *Willis*, L. Rep., 8 Ex. 69.

(*r*) Or by the authority of the Stationery Office (Documentary Evidence Act, 1882, 45 Vict. c. 9).

(*s*) *Harding* v. *Williams*, 14 Ch. D. 199, per Fry, J.

(*s'*) *Arnott* v. *Hayes*, 36 Ch. D. 731; 56 L. J. Ch. 844.

(*t*) See, for instance, the Municipal

in general they are *cumulative*, not *substitutionary; i. e.*, they do not abolish the common-law mode of proof, and only provide a more easy or summary one, of which parties, may, if they please, avail themselves (*u*). An exception to this rule, however, is afforded by the Bankers' Books Evidence Act, 1879, which, for the convenience of bankers, provides that an officer of a bank "shall not in any legal proceedings to which the bank is not a party be compellable to produce any bankers' book the contents of which can be proved" under that Act, "or to appear as a witness to prove the matters, &c., therein recorded, unless by order of a judge made for special cause."

§ 489. 4. Another exception is in the case of public officers. It is a general principle that a person's acting in a public capacity is primâ facie evidence of his having been duly authorised so to do; and even though the office be one the appointment to which must be in writing, it is not, at least in the first instance, necessary to produce the document, or account for its non-production. The grounds of this have been examined in another place (*v*).

§ 490. 5. Where a witness is being interrogated on the *voir dire*, with the view of ascertaining his competency, if that competency depends on written instruments he may state their nature and contents (*x*).

§ 491. The principle of the rule in question being that the secondary evidence borrows its force from the primary, of which, owing to the general infirmity of all derivative proof, it may not be a perfect representation, it follows that *circumstantial* evidence, when original and proximate in its nature, is not affected by the rule (*y*). It is evidence in the *direct*, not in the *collateral* line, which falls within the exclusion. For the same reason it seems — although much has been said and written on both sides of the question — that *self-harming* statements by a party against his own interest are receivable as primary proof of documents. But this will be considered under the head of self-regarding evidence (*z*).

Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 24, substantially re-enacting sect. 2 of the Municipal Corporations' Evidence Act, 1873, 36 & 37 Vict. c. 33.

(*u*) See 31 & 32 Vict. c. 37, s. 6.

(*v*) *Suprà*, ch. 2, sect. 2, sub-sect. 4, § 356.

(*x*) Tayl. Ev. §§ 433 and 1242. See also per Maule, J., in *Macdonnell* v. *Evans*, 11 C. B. 930.

(*y*) Bk. 1, pt. 1, § 88 *et seq.*, and *suprà*, ch. 1, § 295.

(*z*) *Infrà*, ch. 7.

AMERICAN NOTES.

(§ 485) Public Documents. — A. Definition. B. Proof of Contents.

A. Definition. — Public documents have been defined as the "acts of public functionaries, in the executive, legislative, and judicial departments of government, including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation." 1 Greenl. Ev. § 470.

B. Proof of Contents. — I. Acts of State. II. Judicial Records and Writings. III. Other Public Documents.

I. Acts of State. — Whether domestic or foreign, acts of state require no proof. Courts will take judicial cognizance of the form of government under which they are constituted, — its agents, its official seals and transactions, and the official seals of all foreign nations recognized by national authority. See § 253, n. 1 (*a*), *supra*. Womack *v.* Dearman, 7 Port. 513; Story, Confl. Laws, § 643; Robinson *v.* Gilman, 7 Shepl. 299; Coit *v.* Milliken, 1 Denio, 376.

II. Judicial Records and Writings. — A distinction in regard to proof of judicial records has been taken between those (*a*) of a court of record, and those (*b*) of inferior tribunals.

(*a*) *Courts of Record.* — The records of a court of record are provable: —

(1) *Record.* — By the record itself, in cases where the cause is in the same court, or where the record constitutes the subject of proceedings in an appellate or superior court of the same jurisdiction. Ward *v.* Saunders, 6 Ired. (N. C.) 382; Gray *v.* Davis, 27 Conn. 447; State *v.* Bartlett, 47 Me. 396; Harper *v.* Rowe, 53 Cal. 233; Adams *v.* State, 11 Ark. 466. And see also Miller *v.* Hale, 26 Pa. St. 432; Vose *v.* Manly, 19 Me. 331; to the effect that the record is admissible even where a certified copy may be used.

(2) *Exemplifications.* — By exemplifications under the great seal of state, foreign or domestic, or under the seal of the court whose record it is. Church *v.* Hubbart, 2 Cranch, 186; Buttrick *v.* Allen, 8 Mass. 273; Packard *v.* Hill, 7 Cowen, 434, 443; Gardere *v.* Columbian Ins. Co., 7 Johns. 514; Spaulding *v.* Vincent, 24 Vt. 501; Ennis *v.* Smith, 14 How. U. S. 400, 426; U. S. *v.* Wiggins, 14 Pet. 334, 346; Stewart *v.* Swanzy, 23 Miss. 502; Torbert *v.* Wilson, 1 Stew. & Por. 200; Allen *v.* Thaxter, 1 Blackf. 399; Thompson *v.* Stewart, 3 Conn. 171; Warener *v.* Kings Mill, 7 Q. B. U. C. 409; Siddon *v.* Hodnett, 22 Fla. 442; Gormley *v.* Uthe, 116 Ill. 643; Coan *v.* Flagg, 123 U. S. 117. The seal of state proves itself. § 253, n. 1, (*a*) and (*c*), *supra*; Robinson *v.* Gilman, 7 Shepl. 299; Womack *v.* Dearman, 7 Port. 513; Williams *v.* Wilkes, 2 Harris, 228; Stanglein *v.* State, 17 Oh. St. 453; Watson *v.* Walker, 23 N. H. 471, 496. See also Pickard *v.* Bailey, 6 Fost. 152.

(3) *Attested Copy.* — An attested copy authenticated by the proper officer is the mode of proof usual in this country, and more especially as between the courts of the several States. Under the constitutional provision (Const. U. S., art. iv. § 1) requiring that "full faith and credit" be given the records of other States of the American Union, and empowering Congress to legislate to that end, a method of authenticating State records has been provided, which, while not exclusive of other recognized forms of authentication, is commonly employed in practice. See Mills *v.* Duryee, 7 Cranch, 481; Mewster *v.* Spaulding, 6 McLean, 24; Hampton *v.* M'Connel, 3 Wheat. 234; Gilman *v* Gilman, 126 Mass. 26. The provision (Stat. U. S. May 26, 1790; 1 U. S. Stat. at Large, L. & B.'s edition, 122; 2 U. S. Stat. at Large, 298) is given in this connection for convenient reference: "The records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall

be taken." Turnbull *v.* Payson, 95 U. S. 418, 422. By the second section of a supplementary statute (Stat. U. S. March 27, 1804) this enactment was extended to the Territories of the United States, and all countries subject to its jurisdiction. These provisions, however, apply solely to civil process. Com. *v.* Green, 17 Mass. 514, 546. They, however, extend to equity records. Barbour *v.* Watts, 2 A. K. Marsh. 290; Patrick *v.* Gibbs, 17 Tex. 275. And to courts of probate. Houze *v.* Houze, 16 Tex. 598; Washabaugh *v* Entricken, 34 Pa. St. 74; Spencer *v.* Langdon, 21 Ill. 192; Settle *v.* Alison, 8 Ga. 201; Case *v.* McGee, 8 Md. 9; Melvin *v.* Lyons, 10 Sm. & M. 78. The Act does not extend to the records of United States courts. Adams *v.* Way, 33 Conn. 419; Pepoon *v.* Jenkins, 2 Johns. Cas. 119.

Judicial Construction. — For judicial construction of this provision see, as to the certificate of the presiding judge, Smith *v.* Blagge, 1 Johns. Cas. 238; Ferguson *v.* Harwood, 7 Cranch, 408, Shown's Exec'r *v.* Barr, 11 Ired. 296; Stephenson *v.* Bannister, 3 Bibb (Ky.), 369, Kirkland *v.* Smith, 2 Martin N. S. 497; Settle *v.* Alison, 8 Ga. 201; Drummond Admrs. *v.* Magruder's Trustees, 9 Cranch, 122; Craig *v.* Brown, 1 Pet. C. Ct. 352; Bissell *v.* Edwards, 5 Day, 363. See also Hutchison *v.* Patrick, 3 Mo. 48; La Fayette Bank *v.* Stone, 1 Scam. 424. As to the seal of the court, Turner *v.* Waddington, 3 Wash. 126; Dunlap *v.* Waldo, 6 N. H. 450; Kirkland *v.* Smith, 2 Martin N. S. 497; Strode *v.* Churchill, 2 Litt. (Ky.) 75; Thrasher *v.* Ingram, 32 Ala. 645; Roop *v.* Clark, 4 Greene (Ia.), 294. As to the certificate of the clerk, Sampson *v.* Overton, 4 Bibb (Ky.), 409; Schnertzell *v.* Young, 3 H. & McHen. 502; Young *v.* Chandler, 13 B. Monr. (Ky.) 252; Morris *v.* Patchin, 24 N. Y. 394; Gavit *v.* Snowhill, 26 N. J. L. 76; Sherwood *v.* Houston, 41 Miss. 59; Grover *v.* Grover, 30 Mo. 400. As to the presumptive fulness and sufficiency of the record, Ferguson *v.* Harwood, 7 Cranch, 408; Edmiston *v.* Schwartz, 13 S. & R. 135; Goodman *v.* James, 2 Rob. (La.) 297. That this method of proving State records is not exclusive of any recognized State form of authentication, see Kean *v.* Rice, 12 S. & R. 203, 208; Ellmore *v.* Mills, 1 Hayw. (N. C.) 359; Ordway *v.* Conroe, 4 Wis. 45; Smith *v.* Cushman, 59 N. H. 27; Kingman *v.* Cowles, 103 Mass. 283; Karr *v.* Jackson, 28 Mo. 316; Goodwyn *v.* Goodwyn, 25 Ga. 203.

(4) *Office Copy.* — By an office or an examined copy. 1 Greenl. Ev. §§ 507, 508; McGuire *v.* Sayward, 9 Shepl 230; Hill *v.* Packard, 5 Wend. 375; Lynde *v.* Judd, 3 Day, 499; Smith *v.* Cushman, 59 N. H. 27; McLean *v.* McDonnell, 1 Q. B U. C. 13; Woods *v.* Banks, 14 N. H. 101; Tillotson *v.* Warner, 3 Gray, 574. See also Strouther *v.* Christy, 2 Mo. 119; State *v.* Cake, 4 Zab. 516.

(*b*) *Courts not of Record.* — As to proof of the judgments of inferior courts not of record, and minor judicial proceedings, conf. 1 Greenl. Ev. §§ 513–522

III. Other Public Documents. — As a rule, with but slight exceptions, such documents are provable either by production of the original itself, or by a duly authenticated copy, thus: —

(*a*) *Official Communications.* — Copies of messages and other official communications from the President of the United States to one or both Houses of Congress, if printed by the public printer, are sufficient evidence of such documents. Radcliff *v.* United Ins. Co., 7 Johns. 38, 50; Whiton *v.* Albany City Ins. Co., 109 Mass. 24.

(*b*) *State Papers.* — So the American state papers, so called, and the documents therein contained, are provable by printed copy. Nixon *v.* Porter, 34 Miss. 697; Dutillet *v.* Blanchard, 14 La. An. 97; Bryan *v.* Forsyth, 19 How. (U. S.) 334. See also Gilman *v.* Riopelle, 18 Mich. 145.

(*c*) *Legislative Documents.* — So legislative journals and enactments may be sufficiently proved by an officially printed or written copy. The old regulation requiring examination of the copy with the original, such examination being verified by the oath of the examiner, has, in the majority of instances, been dispensed with. Young *v.* Bank of Alexandria, 4 Cranch, 384, 388; Smith *v.* Potter, 27 Vt. 304; Root *v.* King, 7 Cowen, 613, 636; Watkins *v.* Holman, 16 Pet. 25, 56; Post *v.* Supervisors, 105 U. S. 667, 669.

(*d*) *Official Registers.* — So official registers, kept in obedience to legal requirement, are provable by the original record, or by a duly attested copy of the same Bryan *v.* Wear, 4 Mo. 106; U. S. *v* Johns, 4 Dall. 412, 415; Ins. Co. *v.* Rosenagle, 77 Pa. St.

507; Niles *v.* Sprague, 13 Ia. 198; State *v.* Dooris, 40 Conn. 145. So by statutory provision of the enrolment of deeds. Younge *v.* Guilbeau, 3 Wall. 636; Webster *v.* Calden, 55 Me. 165, 171; Chamberlain *v.* Bradley, 101 Mass. 188; McNichols *v.* Wilson, 42 Ia. 385; Williams *v.* Cowart, 27 Ga. 187; Davis *v.* Rhodes, 39 Miss. 152, Musick *v.* Barney, 49 Mo. 458; Canfield *v.* Thompson, 49 Cal. 210. In the absence of an enabling statute, the absence of the original deed must be accounted for and its execution proved to admit a copy of the record. N. Y. Dry Dock *v.* Hicks, 5 McLean, 111; Wendell *v.* Abbott, 43 N. H. 68; Brown *v.* Griffith, 70 Cal. 14; Rollins *v.* Henry, 78 N. C. 342; White *v.* Dwinel, 33 Me. 320. But see Curry *v.* Raymond, 28 Pa. St. 144, *contra*. In the absence of statutory relaxation, the rule is clear that a copy of registration by another State must be in accordance with the Act of Congress stated in B. II. (*a*), (3), of this note, *supra*. Secrist *v.* Green, 3 Wall. 744; Garrigues *v.* Harris, 17 Pa. St. 344; Watrous *v.* McGrew, 16 Tex. 506. It must further appear that the registry was in conformity with the laws of the registering State. Stevens *v.* Bomar, 9 Humph. 546; Dunlop *v.* Daugherty, 20 Ill. 397; Davis *v.* Rhodes, 39 Miss. 152. So of the registers of *births and marriages*. Com. *v.* Littlejohn, 15 Mass. 163; Wedgewood's case, 8 Greenl. 75; Jackson *v.* King, 5 Cowen, 237; Richmond *v.* Patterson, 3 Ohio, 368. Of maritime registers at custom-houses, and the like. U. S. *v.* Johns, 4 Dall. 412, 415; Colson *v.* Bonzey, 6 Greenl. 474; Hacker *v.* Young, 6 N. H. 95; Catlet *v.* Pac. Ins. Co, 1 Wend. 561; Sampson *v.* Noble, 14 La. An. 347. So the records of town meetings, or transactions, and the meetings or transactions of any municipal body, are provable by a copy of the original minutes, or records duly certified by the clerk or other proper officer. Denning *v.* Roome, 6 Wend 651; Com. *v.* Chase, 6 Cush. 248; Dudley *v.* Grayson, 6 Monr. 259; People *v.* Minck, 7 Smith (N. Y.), 539; Hickock *v.* Town of Shelburne, 41 Vt. 409.

(*e*) *Foreign Law.* — The text of a foreign law is a fact provable by exemplification of a copy under the great seal of state, or by a copy examined and compared by a witness, or by a copy duly certified to by the proper officer, thereto authorized and authenticated. Church *v.* Hubbart, 2 Cranch, 187, 238, Lincoln *v.* Battelle, 6 Wend. 475; Ennis *v.* Smith, 14 How. 400; The Pawashick, 2 Lowell, 142. As to proof of foreign unwritten law and customs, see § 511, n. 1 (*d*), *infra*.

(*f*) *Interstate Laws.* — By a strict analogy, it has been held that the law of one State of the American Union must be proved in the courts of another as a foreign law. Hempstead *v.* Reed, 6 Conn. 480; Packard *v.* Hill, 2 Wend. 411; Van Buskirk *v.* Mulock, 3 Harr. (N. J.), 185. See Grant *v.* Coal Co., 80 Pa. St. 208. The great weight of authority is, however, *contra*; the general rule being that a printed volume, purporting to contain the law of a sister State, is prima facie evidence of the law of such State. 1 Greenl. Ev. § 489, n. 3, p. 544; Thompson *v.* Musser, 1 Dall. 458, 463; Mullen *v.* Morris, 2 Barr, 85; Merrifield *v.* Robbins, 8 Gray, 150; State *v.* Stade, 1 D. Chip. 303; Taylor *v.* Bank of Illinois, 7 Monr. 576, 585; Taylor *v.* Bank of Alexandria, 5 Leigh, 471; Clarke *v.* Bank of Mississippi, 5 Eng. 516; Allen *v.* Watson, 2 Hill, 319; Hale *v.* Ross, Pennington, 591; Emery *v.* Berry, 8 Foster, 473; Inge *v.* Murphy, 10 Ala. 885; Martin *v.* Payne, 11 Tex. 292; Rothrock *v.* Perkinson, 61 Ind. 39. The contents of any public document whatever may in all cases be proved by an examined copy. It is not necessary that two persons should alternately have read both the original and the copy. Whitehouse *v.* Bickford, 9 Foster, 471, 480; McLean *v.* McDonell, 1 Q. B. U. C. 13; 1 Greenl. Ev. §§ 91, 508; 1 Whar. Ev. § 94.

(*g*) *Execution.* — In general, it is necessary that the execution of a public document, proved by certified copy, should be established by evidence. Conf. § 215, n. 1, C. II., *supra*. In Massachusetts, however, production of a certified copy is also proof of the execution of the instrument. Gragg *v.* Learned, 109 Mass. 167, Eaton *v.* Campbell, 7 Pick. 10. To the same effect are Knox *v.* Silloway, 1 Fairf. 201; Webster *v.* Calden, 55 Me. 165, 171; Kelsey *v.* Hanmer, 18 Conn. 311. See also 1 Greenl. Ev. § 573, n.; 1 Whar. Ev. § 741; 4 Greenl. Cruise on R. P., tit. 32, ch. 29, § 1, n; Thurman *v.* Cameron, 24 Wend. 87; Loomis *v.* Bedel, 11 N. H. 74.

It will be noticed that the so-called "best evidence rule" (conf. § 215, n. 1, C. III., *supra*) has in strictness, no application to the case of public writings. A properly authenticated copy is a recognized equivalent for the original itself. Crawford *v.* Branch Bank,

8 Ala. 79. And parol evidence is inadmissible in the absence of evidence that the record, or a copy thereof, cannot be obtained. Cornet *v.* Williams, 20 Wall. 226; Wynne *v.* Aubuchon, 23 Mo. 30; Smith *v.* Smith, 43 N. H. 536; Kennedy *v.* Reynolds, 27 Ala. 364; Alexander *v.* Foreman, 7 Ark. 252; Chase *v.* Savage, 55 Me. 543; Platt *v.* Haner, 27 Mich. 167; Ellis *v.* Huff, 29 Ill. 449; Cook *v.* Wood, 1 McC. 139; Lyons *v.* Gregory, 3 Hen. & Munf. 237; Hilts *v.* Colvin, 14 Johns. 682. But see Smith *v.* West *et al.*, 64 Ala. 34, *contra*. See also, for instances where parol evidence has been admitted, Stockbridge *v.* West Stockbridge, 12 Mass. 399; Simpson *v.* Norton, 45 Me. 281; Hall *v.* Manchester, 40 N. H. 410; Burton *v.* Driggs, 20 Wall. 125; Eaton *v.* Hall, 5 Metc. 287.

In regard to the reciprocal relations of the United States courts and courts of the several States, see § 253, n. 1, (*b*), *supra*; 1 Greenl. Ev. § 490.

With regard to the supposed principle which admits the statements of a public document as an exception to the hearsay rule, see § 219 and n. 1, *supra*.

CHAPTER IV.

DERIVATIVE EVIDENCE IN GENERAL.

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§ 492. The infirmity of derivative or second-hand evidence,[1] as compared with its original source, has been shown in the Introduction to this work (*a*); and the danger of this kind of proof increases according to its distance from that source, and the number of media or instruments through which it comes to the cognisance of the tribunal (*b*). The five following forms of it were there enumerated: 1. Supposed oral evidence, delivered through oral. 2. Supposed written evidence, delivered through written. 3. Supposed oral evidence, delivered through written. 4. Supposed written evidence, delivered through oral. 5. Reported real evidence. The last of these (*c*), and the secondary evidence of documents which would be evidence if produced (*d*), have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

§ 493. The general rule is, that derivative or second-hand proofs are not receivable as evidence *in causâ*, — a rule which forms one of

(*a*) Introd. pt. 1, §§ 29, 30; pt. 2, § 51.
(*b*) Introd. pt. 1, §§ 29, 30.
(*c*) See bk. 2, pt. 2, § 198.
(*d*) See the preceding chapter.

[1] For collection of American cases on the hearsay rule, see *infra*, p. 444.

the distinguishing features of our law of evidence (*e*), and the gradual establishment of which has been already traced (*f*). The reasons commonly assigned for it are: 1. That the party against whom the proof is offered has no opportunity of cross-examining the original source whence it is derived; but this will not explain the rejection of second-hand evidence when it comes in a written form. 2. That assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. To this the same objection may be made; besides, the derivative evidence would not be the more receivable if the original evidence were delivered under that sanction, for the statement of a third party made on oath, even in judicio, is not evidence against a person who was no party to the judicial proceeding.

§ 494. The foundations of the rule lie much deeper than this (*g*). Instead of stating as a maxim that the law requires all evidence to be given *on oath*, we should say that the law requires all evidence to be given *under personal responsibility; i. e.*, every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of the sanctions of truth (*h*). Now, oaths, so far from being the sole sanction of truth, are only a particular, although doubtless very effective application of *one*, — namely, the religious sanction (*i*); and if they were abolished, the rule rejecting second-hand evidence ought to remain exactly as it is. Indeed, several classes of persons are excused by statute from taking oaths (*k*); and their evidence, given on solemn affirmation, stands on the same footing with relation to admissibility as if they had been sworn. The true principle therefore appears to be this, — that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected. And this will explain a matter which at first view seems anomalous; namely, that the principle governing *secondary* does not extend to *second-hand* evidence; for in the latter case, no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received. Thus, what A. (a witness) has heard B. (a stranger) say, is not only not admissible in the first

(*e*) Introd. pt. 1, § 29, and bk. 1, pt. 1, § 89.

(*f*) Bk. 1, pt. 2.

(*g*) In Stephen on Evidence, p. 155, it is said that "the importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron Parke's illustrations" (in *Doe* v. *Tatham*, 7 A. & E. 385) "of its operation clearly prove that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence."

(*h*) Introd. pt. 1, §§ 16 *et seq.*

(*i*) Introd. pt. 2, §§ 56 *et seq.*

(*k*) See bk. 2, pt. 1, ch. 2, § 166.

instance, but the clearest proof of the death, or of the complete and incurable lunacy of B., would not render it admissible. The reason is that, in the one case, the primary source being perfect in itself, and receivable in evidence if produced, so soon as that source is exhausted, the evidence offered is simply derivative of it, and excludes all possible chances of error except those which may be found in the medium of evidence used. But when the document is one which would not be evidence if produced, as not being traced to the party against whom it is offered; or where the proof tendered, consists of the statement of a person who cannot be subjected to cross-examination, the primary source is not exhausted, and derivative proof is rightly rejected.

§ 495. The rule in question is commonly enunciated, both in the books and in practice, by the maxim, "Hearsay is not evidence," — an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind: first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable, — positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him (*l*); and on the other, as already stated (*m*), written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with *res gestæ*;[1] *i. e.*, the original proof of what has taken place; and which the least reflection will show may consist of *words* as well as of *acts*. Thus on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be (*n*); and so are the cries of a woman who is being ravished (*o*), and her complaint afterwards (*p*), but not the particulars of such complaint (*q*). So, where an action on a policy of insurance, effected by a deceased person on his own life, was defended on the ground

(*l*) See *infrà*, ch. 7.

(*m*) *Suprà*, § 494.

(*n*) Case of *Damaree* and *Purchase*, Fost. Cr. Law, 213; 15 How. St. Tr. 522; *R.* v. *Lord George Gordon*, 21 How. St. Tr. 514, 529.

(*o*) See Mascard. de Prob. Concl. 23, n. 1.

(*p*) *R.* v. *Walker* 2 M. & R. 212.

(*q*) *Id.* The exclusion of the particulars has been said to be not in accordance with common-sense (see Stephen on Evidence, p. 150, citing the opinion of Parke, B., in *R.* v. *Walker*, and the practice of Willes, J., and Bramwell, B.), and the propriety of the exclusion seems to require confirmation or the reverse by a Court of Criminal Appeal. In favour of the exclusion may be urged the facilitation of fraud and manufacture of evidence, which the admission of the particulars would give rise to.

[1] For the American law as to the *res gestæ*, see *infra*, p 446.

that he had no interest in the policy, evidence that, previous to effecting the insurance, the deceased had consulted another person on the subject of insuring his own life, was held to be admissible as part of the *res gestæ* (*r*). So, although the relation of what a stranger has been heard to say will be rejected (*s*), if offered as evidence of the truth of his words, seeing that it comes *obstetricante manu;* yet whether certain words were spoken is a *fact*, and may be proved as such, if relevant to the issue raised. Thus, although common rumour cannot be received as proof of a fact, — being hearsay in one of its worst forms, — yet when the conduct of a person is in question, evidence as to whether a certain rumour had reached his ears at a particular time may be perfectly receivable (*t*). We are not to consider whether evidence comes by word of mouth or by writing, but whether it is original in its nature, or indicates any better source from which it derives its weight.

The statement of a person shortly after receiving a wound, if made in the presence of the person who gave the wound, is admissible in evidence against that person, and may also be admissible as a dying declaration, though made in the absence of such person; but it is not admissible as part of the *res gestæ*. This is well exemplified by *Reg.* v. *Bedingfield*. There, a woman with her throat cut came out of a room in which the prisoner, also with his throat cut, was lying speechless, and said, "See what Harry has done," a few minutes before she died. Cockburn, C. J., rejected evidence of this statement by the deceased (*t'*) after consultation with Field and Manisty, JJ., upon the trial of the prisoner for murder. The rejection led to an animated controversy as to its legal propriety between Mr. Pitt Taylor and the Lord Chief Justice (*t''*), in which the latter had the best of it.

§ 496. There are several exceptions to the rule excluding second-hand evidence; and it will be found, on examination, that in almost, if not in all the cases where the rule has been relaxed, the derivative evidence received, is guarded by some security which renders it more trustworthy than derivative evidence in general. First, then, on a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable,[1]

(*r*) *Shilling* v. *The Accidental Death Company*, 4 Jur. N. S. 244, per Erle, J. And see *Milne* v. *Leisler*, 7 H. & N. 786.

(*s*) *State* v. *Duncan*, 6 Ired. 236.

(*t*) 2 Inst. 52; T. 1 Edw. II. 12, tit. Imprisonment; *Jones* v. *Perry*, 2 Esp. 482; *Thomas* v. *Russell*, 9 Exch. 764. See Goodeve, Evidence, 423.

(*t'*) *Reg.* v. *Bedingfield*, 14 Cox C. C. 341, and see reporter's note. The prisoner was convicted and executed.

(*t''*) See Law Journal for 1880, pp. 5 and 18.

[1] For the American law, see *infra*, p. 448

and may be proved by the testimony of a person who heard it, or by notes made at the time (*u*). Here the evidence was originally delivered under responsibility, and the party against whom it is offered had on a former occasion the opportunity for cross-examination; still the benefit of the demeanour of the witness in giving it is lost. So by the 11 & 12 Vict. c. 42, s. 17, where a witness who has been examined before a justice of the peace, against a person charged with an offence, dies before the trial of the accused, or is so ill as to be unable to travel, his deposition, reduced to writing and signed by the justice, may be received in evidence (*x*).

§ 497. 2. The next exception is in the proof of matters of public and general interest;[1] such as the boundaries of counties or parishes, rights of common, claims of highway, &c. (*y*). We have seen that in proof of historical facts, — of what has taken place in bygone ages, — derivative evidence must not only from necessity be resorted to, but that it is disarmed of much of its danger, from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may spring, the number of persons interested in preserving the recollection of the matters in question, and the consequent facilities for detecting false testimony (*z*). Now it is obvious that rights of public or general interest which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation; *e. g.*, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject (*a*); by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, &c. But in order to guard against fraud, it is an established principle that such declarations, &c., must have been made "ante *litem motam*," — an expression which has caused some difference of opinion, but which seems to mean, before any *controversy* has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit (*b*). The value of this species of evidence manifestly depends on the degree of publicity of the

(*u*) 1 Phill. Ev. 306, 10th Ed.

(*x*) Bk. 1, pt. 1, § 105.

(*y*) See as to this, very fully, *R.* v. *Inhabitants of Bedfordshire*, 4 E. & B. 535, 542. See also 1 Phill. Ev. ch. 8, sect. 3, 10th Ed.; Tayl. Ev. pt. 2, ch. 8, 4th Ed. See Mascard. de Prob. Concl. 287, 395–403. As to what are *public* rights, within the rule in question, see *Lord Dunraven* v. *Llewellyn*, 15 Q. B. 791.

(*z*) Introd. pt. 2, §§ 50 *et seq.*

(*a*) See *Crease* v. *Barrett*, 1 C. M. & R. 919.

(*b*) 1 Phill. Ev. 194, 10th Ed.; Tayl. Ev. §§ 515 *et seq.*, 4th Ed.; *Butler* v. *Lord Mountgarrett*, 7 Ho. Lo. Cas. 633.

[1] The American cases are collected, *infra*, p. 450.

matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for substitution or fabrication.

§ 498. 3. Matters of pedigree — *e. g.*, the fact of relationship between particular persons; the births, marriages, and deaths of members of a family, &c. — form the next exception (*c*).[1] "Quoties quæreretur, genus vel gentem quis haberet, necne, eum probare oportet" (*d*). These likewise partake of the nature of historical facts in this, that they usually refer to matters which have occurred in times gone by, and among persons who have passed away; though in attempting to prove them by derivative evidence, the check afforded by notoriety is wanting, seeing that they are matter of interest to only one, or at most a few families. Still, the extreme difficulty of procuring any better evidence compels the reception of this, when it comes from persons most likely to be acquainted with the truth, and under no temptation to misrepresent it. Thus declarations of deceased members of a family (*e*), made "ante *litem motam*" (*f*), and not made by the declarant obviously for his own interest (*g*); the general reputation of a family, proved by a surviving member of it; entries contained in books, such as family Bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries (*h*); correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin-plates; charts of pedigrees, made or adopted by deceased members of the family, &c., — have severally been held receivable in evidence for this purpose (*i*). And it is impossible to dispense with this kind of evidence, especially in proof of remote and collateral matters; but tribunals should be on their guard, when the actual point in issue in a cause depends wholly or chiefly upon it. It is from its nature very much exposed to fraud and

(*c*) 1 Phill. Ev. ch. 8, sect. 4, 10th Ed.; Tayl Ev. pt. 2, ch. 9, 4th Ed.; *Att.-Gen.* v. *Köhler*, 9 Ho. Lo. Cas. 654, 670.

(*d*) Dig. lib. 22, tit. 3, l. 1.

(*e*) Before such a declaration can be admitted in evidence, the relationship of the declarant, *de jure*, by blood or marriage, must be established, by some proof independent of the declaration itself, and it is for the judge to decide whether this relationship is established. But it appears that evidence of the declaration is admissible, if there be *primâ facie* proof of the relationship of the declarant. *Plant* v. *Taylor*, 7 H. & N. 211, 237; *Hitchins* v. *Eardley*, L. Rep., 2 P. & D. 248.

(*f*) See 1 Phill. Ev. 206, 10th Ed.; *Gee* v. *Ward*, 7 E. & B. 509.

(*g*) Per Cur., *Plant* v. *Taylor*, 7 H. & N. 211, 238.

(*h*) *Hubbard* v. *Lees*, L. Rep., 1 Ex. 255, 258.

(*i*) In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother of A., that the plaintiff was A.'s natural son, was held to be inadmissible. *Crispin* v. *Doglioni*, 32 L. J., P. & M. 109.

[1] For a collection of the American cases on declarations concerning pedigree, see *infra*, p. 451.

fabrication; and even assuming the declaration, inscription, &c., correctly reported by the medium of evidence used, many instances have shown how erroneous is the assumption that all the members of a family, especially in the inferior walks of life, are even tolerably conversant with the particulars of its pedigree (*k*). And it must be borne in mind that evidence of this kind is received in questions of pedigree only; for instance, it is inadmissible to support a defence of infancy to a claim for a debt (*k'*).

§ 499. 4. The next instance in which this rule is relaxed seems to rest even more exclusively on the principle of necessity; namely, that ancient documents purporting to constitute part of, or at least to have been executed contemporaneously with the transactions to which they relate, are receivable as evidence of ancient possession, in favour of those claiming under them, and even against others who are neither parties nor privies to them (*l*).[1] "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence" (*m*). In order to guard against the too manifest dangers of this kind of proof, it is established as a condition precedent to its admissibility that the document must be shown to have come from the proper custody; *i. e.*, to have been found in a place in which, and under the care of persons with whom, it might naturally and reasonably be expected to be found (*n*); although it is no objection that some other *more* proper place, &c., may be suggested (*o*). The elder civilians applied, with tolerable justice, the term "piscatio anguillarum" to the proof of immemorial possession (*p*).

§ 500. 5. Declarations made by deceased persons against their own interest are receivable in evidence in proceedings between third parties, provided such declarations were made against *proprietary* (*r*) or *pecuniary* interest (*s*),[2] and do not derogate from the title of third parties; *e. g.*, a declaration made by a deceased tenant is not admis-

(*k*) See per Romilly, M. R., *Crouch* v. *Hooper*, 16 Beav. 182.

(*k'*) *Haines* v. *Guthrie*, 13 Q. B. D. 818; 53 L. J. Q. B. 521, C. A.

(*l*) 1 Phill. Ev. ch. 8, sect. 5, 10th Ed.; Tayl. Ev. pt. 2, ch. 10, 4th Ed.

(*m*) Per Willes, J., delivering the opinion of the judges in *Malcomson* v. *O'Dea*, 10 Ho. Lo. Cas. 593, 614.

(*n*) *The Bishop of Meath* v. *The Marquess of Winchester*, 3 Bing. N. C. 200, 202.

(*o*) *Id.*; *Croughton* v *Blake*, 12 M. & W. 205; *R.* v. *Mytton*, 2 E. & E. 557.

(*p*) Bonnier, Traité des Preuves, § 732.

(*r*) *R.* v. *Exeter*, L. Rep., 4 Q. B. 441.

(*s*) *The Sussex Peerage case*, 11 Cl. & F. 85. See *R.* v. *The Overseers of Birmingham*, 1 B. & S. 763.

[1] The American cases are collected, *infra*, p. 452.

[2] For the American law on this subject, see *infra*, p. 453.

sible if it derogates from the title of the reversioner (*t*). The leading case on this subject is *Higham* v. *Ridgway* (*t'*), in which an entry made by a man-midwife who had delivered a woman of a child, of his having done so on a certain day, and referring to his ledger, in which he had made a charge for his attendance, which was marked as *paid*, was held to be evidence, after the death of the midwife, of the age of the child at the time of his afterwards suffering a recovery.

The admissibility of declarations against interest, made by parties to a suit, rests on a different principle (*u*). The ground of this exception is, the improbability that a party would falsely make a declaration to fix himself with liability; but cases may be put where his doing so would be an advantage to him. *E. g.*, the accounts of the receiver or steward of an estate have, through neglect or worse, got into a state of derangement which it is desirable to conceal from his employer; and one very obvious way of setting the balance straight is by falsely charging himself with having received money from a particular person.

§ 501. 6. Allied to these are declarations in the regular course of business, office, or employment, by deceased persons who had a personal knowledge of the facts, and no interest in stating an untruth (*x*).[1] But the rule as to the admission of such evidence is confined strictly to the particular thing which it was the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing (*y*). And it is also a rule with regard to this class of declarations, that they must have been made *contemporaneously* with the acts to which they relate (*z*).

§ 502. In both classes, — viz., declarations against interest, and declarations in the regular course of business, &c., — the evidence commonly appears in a written form; and it has even been made a question whether this is not essential to its admissibility (*a*). But the inclination of the authorities is rather to the effect that *verbal* declarations, answering of course all other requisite conditions,

(*t*) *Papendick* v. *Bridgwater*, 5 E. & B. 166.

(*t'*) *Higham* v. *Ridgway*, 10 East, 109; 2 Sm. L. C.

(*u*) *Infrà*, ch. 7.

(*x*) 1 Phill. Ev. ch. 8, sect. 8; Tayl. Ev. pt. 2, ch. 12, 4th Ed. For the authorities on this subject, see the note in 1 Smith, Lead. Cas., to the case of *Price* v. *The Earl of Torrington* (reported 1 Salk. 285; 2 Ld. Raym. 873; Holt, 300).

(*y*) Per Blackbourn, J., *Smith* v. *Blakey*, L. Rep., 2 Q. B. 326, 332.

(*z*) *Doe* d. *Patteshall* v. *Turford*, 3 B. & Ad. 898, per Parke, J.; *Short* v. *Lee*, 2 Jac. & W. 475, per Sir T. Plumer, M. R.

(*a*) *Fursdon* v. *Clogg*, 10 M. & W. 572.

[1] The American cases are collected, *infra*, p. 454.

are equally receivable (*b*); and indeed it seems difficult to establish a distinction in principle between the cases.

§ 503. 7. The civil law (*c*), and the laws of some foreign countries (*d*), receive the books of tradesmen, made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer;[1] and, as is evident from the still unrepealed statute, 7 Jac. I. c. 12 (*d'*), which enacts that shop-books shall not be evidence of a debt more than a year old, such books were at one time receivable as evidence in England. Sensible of the weakness and danger of this sort of evidence, the civilians only allowed it the force of a semi-proof, and by thus investing it with an artificial value, increased the danger of receiving it (*e*). There is no analogy between entries made in his books by a living tradesman, and entries made in those books by a clerk or servant who is deceased, and who, in making them, probably charged himself to his master. And turn or torture this question as we will, to admit the former is a violation of the rule, alike of law and common-sense, that a man shall not be allowed to manufacture evidence for himself (*f*). It is true that tradesmen's books are usually kept with tolerable, and in some instances with great accuracy; but may not the reason of this be, that as the law will not allow them to be used for the purpose of fraudulently charging others, they are now kept for the sole and bonâ fide purpose of refreshing the memory of the tradesman as to what goods he has supplied? Besides, it is to be observed that almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may the tradesman appear as a witness (*g*), and use his books as memoranda to refresh his memory with respect to the goods supplied (*h*), but

(*b*) *Sussex Peerage case*, 11 Cl. & F. 113, per Ld. Campbell; *Stapylton* v. *Clough*, 2 E. & B. 933; *Edie* v. *Kingsford*, 14 C. B. 759, 763.

(*c*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. § 719. This well-known doctrine of the civilians was implanted by them in most countries of Europe; but if it is derived from the *Roman* law (which is doubtful), it is wholly at variance with the principles laid down in other parts of the Corpus Juris Civilis. *E. g.*, "Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit. Unde neque fiscum, neque alium quemlibet ex suis subnotationibus debiti probationem, præbere posse oportet." Cod. lib. 4, tit. 19, l. 7. "Factum cuique suum, non adversario nocere debet." Dig. lib. 50, tit. 17, l. 155. See also Dig. lib. 2, tit. 14, l. 27, § 4; Cod. lib. 7, tit. 60, ll. 1 & 2.

(*d*) Tayl. Ev. §§ 641–643.

(*d'*) See this statute in the Statutes Revised, 2nd Ed. vol. i., p. 564.

(*e*) Heinec. *in loc. cit.* See Bentham's comment on the civil-law practice in this respect, 5 Jud. Ev. 481, 482; and *suprà*, Introd. pt. 2, § 70, n. (*f*).

(*f*) *Infrà*, ch. 5 and ch. 7.

(*g*) Bk. 2, pt. 1, ch. 2.

(*h*) Bk. 2, pt. 3, ch. 1.

[1] For the greatly extended American rules on the subject, see *infra*, p. 454.

those books are always available as "indicative" evidence (*i*); and especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.

§ 504. 8. Books of a deceased incumbent, — rector or vicar, — containing receipts and payments by him relative to the living, have frequently been held receivable in evidence for his successors (*k*). This has been complained of as anomalous (*l*), but the admissibility of such evidence was fully recognised in *Young* v. *The Master of Clare Hall* (*m*); where, however, the court assigned no reason for their decision, apparently deeming the question settled by authority. So evidence has been admitted of declarations by a deceased rector, as to a custom in the parish relative to the appointment of churchwardens (*n*).

§ 505. 9. The last exception to this rule is that of declarations made by persons under the conviction of their impending death (*o*).[1] "Nemo moriturus præsumitur mentiri" (*p*), — the circumstances under which such declarations are made may fairly be assumed to afford a guarantee for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge which would render his evidence receivable (*q*); as likewise will those of an adult whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution (*r*).

The principal objection, however, to second-hand evidence is, not that it is not guarded by an oath, but that the party against whom it is offered is deprived of his power of cross-examining, and the jury of the opportunity of observing the demeanour, of the person whose testimony is relied on. Besides, if the solemnity of the occasion on which dying declarations are made constituted their *sole* ground of admissibility, it would not be confined, as it appears to be by law, to a solitary class of cases; *i. e.*, charges of homicide, where the language of the deceased referred to the injury which he expected

(*i*) For "indicative evidence" see bk. 1, pt. 1, § 93.

(*k*) See the cases collected, 1 Phill. Ev. 267–269, 10th Ed.

(*l*) 1 Phill. Ev. *in loc. cit.*

(*m*) 17 Q. B. 529.

(*n*) *Bremner* v. *Hull*, L. Rep., 1 C. P. 748.

(*o*) *R.* v. *Jenkins*, L. Rep., 1 C. C. 187; and see note to *Reg.* v. *Bedingfield*, 14 Cox, C. C. at p. 343.

(*p*) 2 How. St. Tr. 18.

(*q*) Bk. 2, pt. 1, ch. 2.

(*r*) 1 Phill. Ev. 242, 10th Ed.; Appleton, Evid. 203, n. (*v*).

[1] The American rule is stated, *infra*, p. 456.

would shortly cause his death (*s*). Two other reasons plead for the reception of this evidence in those cases: 1. The difficulty of procuring better proof of the fact, — the injured party being no more, the most obvious and direct source of evidence has perished. 2. Although society has an immense interest in punishing crimes of such magnitude, the witnesses who appear to prove them rarely have an interest in putting into the mouths of the dying persons language which they did not use. In civil matters it is far otherwise, as fatal experience has taught men in all countries where nuncupative wills have been allowed.

(*s*) *R.* v. *Mead*, 2 B. & C. 605, 608; *R.* v. *Hind*, Bell, C. C. 253. Some old cases, in which such declarations were received in civil proceedings, seem to be overruled by *Stobart* v. *Dryden*, 1 M. & W. 615, 626.

AMERICAN NOTES.

(§ 492) Rule against Hearsay. — (*a*) *Rule.* — No oral or written statement, the probative force of which depends *in whole or in part* on the credibility of its maker, can be given in evidence by any other than the original, percipient witness of the fact to which such statement relates. 1 Greenl. Ev. § 98, *et seq.*; Mima Queen *v.* Hepburn, 7 Cranch, 290; Davis *v.* Wood, 1 Wheat. 6, 8; Salem, &c. Co. *v.* Pennington, 62 Ind. 175; Fougue *v.* Burgess, 71 Mo. 389; Coleman *v.* Southwick, 9 Johns. 45; Anderson *v.* Fetzer, 75 Wis. 562; Village *v.* Crawford, 18 Neb. 551; Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324; Scales *v.* Desha, 16 Ala. 308; Sherwood *v.* Houston, 41 Miss. 59; Page *v.* Parker, 40 N. H. 47; Demoney *v.* Walker, 1 N. J. L. 33; Brooks *v.* Acton, 117 Mass. 204; Forrester *v.* State, 46 Md. 154; Kent *v.* Mason, 79 Ill. 540; Cobleigh *v.* McBride, 45 Ia. 116; Bornheimer *v.* Baldwin, 42 Cal. 27. But see Gould *v.* Smith, 35 Me. 513, *contra*. The rule does not apply to the court. Bridges *v.* Hyatt, 2 Abb. (N. Y.) Prac. 449. And see also Hill *v.* North, 34 Vt. 604; Pearson *v.* Darrington, 32 Ala. 227; Cheever *v.* Congdon, 34 Mich. 296. So medical books, even of good authority, cannot be read to the jury. Brown *v.* Sheppard, 13 Q. B. U. C. 178. Fox *v.* Peninsular Co., 84 Mich. 676; Bloomington *v.* Shrock, 110 Ill. 219; Tucker *v.* Donald, 60 Miss. 460; Marshall *v.* Brown, 50 Mich. 148; Com. *v.* Marzynski, 149 Mass. 68; Gallagher *v.* Market R. R., 67 Cal. 13. Or other books of science. Kreuziger *v.* R. R., 73 Wis. 158; Hopt *v.* Utah, 110 U. S. 574. But see § 511 (*b*). But mortality tables of standard authority are admissible. R. R. *v.* Putnam, 118 U. S. 545; R. R. *v.* Ayres, 16 Lea, 725; McKeigue *v.* Janesville, 68 Wis. 50; R. R. *v.* Arispe, 81 Tex. 517. Statement by person as to date of his birth said to be hearsay. Doe *v.* Ford, 3 Q. B. U. C. 352. But see Morrell *v.* Morgan, 65 Cal. 575; Comstock *v.* State, 14 Neb. 205, *contra*. A recognized exception to the hearsay rule is that which admits the declaration of a testator as to the contents of a lost will. Steph. Dig. Ev., art. 39; 1 Wharton Ev. § 139; Schouler on Wills, § 403; Matter of Page, 118 Ill. 576.

The hearsay rule has been frequently so defined as to make many of its so-called "exceptions" fall outside its scope. Conf. 1 Greenl. Ev. § 123. The question is one of definition. If the hearsay rule excludes only such statements of persons not witnesses as rest for probative force solely on the credit of their maker, all statements which have an evidentiary force *per se* are not within the rule. Declarations which derive credit from comparing the statement made with the position or interest of the maker — *e. g.*, admissions, declarations against interest, or concerning pedigree — are original evidence. Equally so, for a like reason, are those which derive credit from the circumstances under which they are made, — for example, dying declarations. It seems better, however, in view of

the practical dangers against which the hearsay rule was intended to provide, and the careful and illogical manner in which innovations have been permitted, to treat the recognized exceptions to the hearsay rule as such. For some consideration of the so-called exception of the *res gestæ*, conf. § 495, n. 1, *infra*.

(*b*) *Scope of the Rule.* — The rule excluding hearsay does not extend to the exclusion of all statements by persons not witnesses. It excludes the statement in its probative capacity, — as evidence of the fact which it directly asserts. Statements by persons not called as witnesses may be, and often are, original evidence, direct or circumstantial.

(1) *Facts in Issue.* — Thus, if the speaking of words be in issue regardless of the truth or falsity of the statement made; *e. g.*, where the giving of notice or the speaking of words alleged to be slanderous is a fact in issue or a fact relevant thereto, the hearsay rule has no application. The fact that a given statement has been made, differs in no way, so far as proof is concerned, from any other fact equally relevant. 1 Greenl. Ev. § 101; Com. *v.* Alley, Mass. 1873, pamph. 38; Jacobs *v.* Whitcomb, 10 Cush. 255; Willett *v.* People, 27 Hun, 469, 479. See also Morrissey *v.* Ingham, 111 Mass. 63; People *v.* McCrea, 32 Cal. 98; Jordan *v.* Com., 25 Gratt. 943. So also the prior statement of a witness may be used to contradict his present evidence. State *v.* Blake, 25 Me. 350. In like manner, statements of persons not witnesses may be used for the purpose of "refreshing memory." State *v.* Fox, 25 N. J. L. 566; Hill *v.* North, 34 Vt. 604; Phila. R. R. *v.* Stimpson, 14 Pet. 448, 462. So the making of threats or other statements may be an admissible fact. Sparks *v.* Com., 89 Ky. 644; Casat *v.* State, 40 Ark. 511; Smith *v.* Whittier, 95 Cal. 279; Jones *v.* Townsend, 21 Fla. 431; People *v.* Wood, 126 N. Y. 249. But see Com. *v.* Matthews, 89 Ky. 287, *contra*. So of usual expression of feeling. State *v.* Hargrave, 97 N. C. 457. A date may be established by a hearsay remark. Barrow *v.* State, 80 Ga. 191.

(2) *Statements by a Testator.* — In like manner, if the testamentary capacity of a testator be in issue, his declarations are admissible in all cases where mental ability or inclination to make such statements is relevant to the issue. Such declarations cannot be directly used as proof of the matters stated. Robinson *v.* Adams, 62 Me. 369; Shailer *v.* Bumstead, 99 Mass. 113; McTaggart *v.* Thompson, 14 Pa. St. 149; Thompson *v.* Ish, 99 Mo. 160; Comstock *v.* Hadlyme, &c. Soc., 8 Conn. 254; Waterman *v.* Whitney, 1 Kernan, 157; Mooney *v.* Olsen, 22 Kans. 64; Pinney's Will, 27 Minn. 280, 283. But see Dennis *v.* Weekes, 51 Ga. 24; Cawthorn *v.* Haynes, 24 Mo. 236; Doe d. Stevens *v.* Ford, 3 Q. B. U. C. 352. So if the question be one of fraud or undue influence, declarations of the testator are admissible to show the effect of the alleged conduct on the mind of the deceased, — to establish the influence and effect of the external acts upon the testator himself. It is the existence of the statement, and not its accuracy, which is admitted. Shailer *v.* Bumstead, 99 Mass. 113, 126, per Colt, J.; Herster *v.* Herster, 116 Pa. St. 612; Gardner *v.* Frieze, 16 R. I. 640; Maxwell *v.* Hill, 89 Tenn. 584; Cudney *v.* Cudney, 68 N. Y. 148, 152, per Rapallo, J.; Linch *v.* Linch, 1 Lea (Tenn.), 526.

(3) *Information.* — So where the inquiry is as to the legal consequences of conduct, the information upon which such conduct was based is admissible, though consisting of statements by persons not examined. Merwin *v.* Arbuckle, 81 Ill 501; People *v.* Shea, 8 Cal. 538; Lee *v.* Kilburn, 3 Gray, 594; Monahan *v.* Worcester, 150 Mass. 439.

(4) *Reputation.* — So general reputation, though obviously the unsworn statement of third parties, is admissible in all cases where the fact to be established is simply the existence of the reputation. Hard *v.* Brown, 18 Vt. 87; Benoist *v.* Darby, 12 Mo. 196; Whitcher *v.* Shattuck, 3 All. 319; Stallings *v.* State, 33 Ala. 425; Taylor *v.* Horsey, 5 Harr. (Del.) 131; Bank of Middlebury *v.* Rutland, 33 Vt. 414; Adams *v.* State, 25 Oh. St. 584; Hodges *v.* Coleman, 76 Ala. 103; R. R. *v.* Hall, 87 Ala. 708; Kuglar *v.* Garner, 74 Ga. 765. But see Tucker *v.* Constable, 16 Oreg. 407. That the character of a house can be shown by reputation, see Stone *v.* State, 22 Tex. App. 185. But see Handy *v.* State, 63 Miss. 207. Reputation is sufficient to show that a party seizing goods was a deputy-sheriff. Holt *v.* Jarvis, Draper's (K. B.) Can. Rep. 200.

(5) *Market Value.* — So also, if market value be relevant to the issue, it is no objection to its admission that the evidence concerning such market value rests ultimately or directly upon hearsay. Cliquot's Champagne, 3 Wall. 114, Laurent *v.* Vaughn, 30 Vt.

90; Mish *v.* Wood, 34 Pa. St. 451; Doane *v.* Garretson, 24 Ia. 351; Whitbeck *v.* N. Y. Cen. R. R. Co., 36 Barb. 644; Whitney *v.* Thacher, 117 Mass. 523, 527; Whelan *v.* Lynch, 60 N. Y. 469. But see Powell *v.* Governor, 9 Ala. 36, *contra*. Offers are not evidence of value. Watson *v.* R. R., 57 Wis. 332; Sherlock *v.* R. R., 130 Ill. 403; Jones *v.* Jones, 120 N. Y. 589; Norton *v.* Willis, 73 Me. 580. Sales are some evidence. Buford *v.* McGetchie, 60 Ia. 298; Northwestern Fuel Co. *v.* Mahler, 36 Minn. 166; Rawson *v.* Prior, 57 Vt. 612; Roberts *v.* Boston, 149 Mass. 346. But must be reasonably near the time of inquiry. Miner *v.* R. R., 153 Mass. 398. And see also Burrill *v.* Lumber Co., 65 Mich. 571. Experts are not necessary. Alt *v.* Fig Co., 19 Nev. 118; Carter *v.* Thurston, 58 N. H. 104; Finch *v.* R. R., 46 Minn. 250. It is no objection to evidence of value that it is based on opinion. R. R. *v.* Hogset, 67 Tex. 685; R. R. *v.* De Lissa, 103 Mo. 125; Lommeland *v.* R. R., 35 Minn. 412. Market value at some convenient point is the criterion. McDonald *v.* Unaka Timber Co, 88 Tenn. 38. Local newspaper quotations are admissible. Peter *v.* Thickstun, 51 Mich. 589.

(§ 495) Statements Part of the Res Gestæ. — (*a*) *Rule.* — The rule admitting statements by persons not witnesses as part of the *res gestæ* (or "transaction") has received extended development in this country beyond the limited English rule. R. *v.* Bedingfield, 14 Cox, C. C. 341. But see Rouch *v.* Gt. Western R. R. Co., 1 Q. B. 51, 60. The principle recognized, more or less clearly, by the American authorities, is this. Oral or written declarations, by whomever made, accompanying and assisting to constitute facts in issue or facts evidentiary thereto, are competent evidence. 1 Greenl. Ev. § 108; Lund *v.* Tyngsborough, 9 Cush. 36; Ins. Co. *v.* Mosley, 8 Wall. 397; Newton *v.* Mut. Ben. Life Ins. Co., 2 Dill. C. Ct. 154; Castner *v.* Sliker, 4 Vroom, 95; State *v.* Horton, 33 La. An. 289; Collogan *v.* Burns, 57 Me. 449; Swift *v.* Mass. &c. Ins. Co., 63 N. Y. 186; Com. *v.* Roberts, 108 Mass. 296; Mack *v.* State, 48 Wis. 271, 279; Baker *v.* Gausin, 76 Ind. 317; Driscoll *v.* People, 47 Mich. 413; O'Connor *v.* Chic., Milw. & St. Paul R. R., 27 Minn. 166; State *v.* Banks, 10 Mo. Ct. App. 111; Smith *v.* Bedell, 48 N. H. 546; Ahern *v.* Goodspeed, 72 N. Y. 108. See also Twombley *v.* R. R. Co., 69 N. Y. 158; Reynolds Ev. § 9. In Mayer *v.* State, 64 Miss. 329, the statement is made that "the true rule for the admission of such evidence is that the statement testified to is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part."

Provided, (1) such declaration be contemporaneous with the fact which it assists to constitute. 1 Greenl. Ev. § 110; New Milford *v.* Sherman, 21 Conn. 101; Cox *v.* State, 64 Ga. 374; Jones *v.* State, 71 Ind. 66; State *v.* Belcher, 13 S. C. 459, 463; Mitchum *v.* State, 11 Ga. 615; Com. *v.* Hackett, 2 All. 136; Blake *v.* Damon, 113 Mass. 199; Colquitt *v.* State, 34 Tex. 550; Mabley *v.* Kittleberger, 37 Mich. 360; Fifield *v.* Richardson, 34 Vt. 410; Felt *v.* Armidon, 43 Wis. 467; Entwhistle *v.* Feighner, 60 Mo. 214; Porter *v.* Waltz, 108 Ind. 40; Tennis *v.* Rapid Transit Co., 45 Kans. 503; State *v.* King, 9 Mont. 445; R. R. *v.* Buck, 116 Ind. 566; R. R. *v.* Holland, 82 Ga. 257; R. R. *v.* Becker, 128 Ill. 545; Harriman *v.* Stowe, 57 Mo. 93. But see R. R. *v.* Barron, 78 Tex. 421.

And *provided*, (2) the declaration so limit, explain, or characterize such fact as in a just sense to be part of it, and necessary to its complete understanding. *In re* Taylor, 9 Paige, 611; Wesson *v.* Wash. Iron Co., 13 All. 95; Ross *v.* State, 62 Ala. 224; Stephens *v.* McCloy, 36 Ia. 659; Bass *v.* R. R., 42 Wis. 654; Sears *v.* Hayt, 37 Conn. 406; Carter *v.* Beals, 44 N. H. 408; Louden *v.* Blythe, 16 Pa. St. 532; Dillard *v.* Scruggs, 36 Ala. 670; State *v.* Howard, 32 Vt. 380; Steamboat Co. *v.* Brockett, 121 U. S. 637; Little *v.* State, 75 Tex. 616; Etna *v.* Brewer, 78 Me. 377; Conlan *v.* Grace, 36 Minn. 276; Harper *v.* Dail, 92 N. C. 394; Smith *v.* Putnam, 62 N. H. 369; Johnson *v.* State, 88 Ga. 203; R. R. *v.* Anderson, 82 Tex. 516; Carr *v.* State, 43 Ark. 99; Ordway *v.* Sanders, 58 N. H. 132; Wiley *v.* Athol, 150 Mass. 426; Tait *v.* Hall, 71 Cal. 149; McLeod *v.* Ginther, 80 Ky. 399; Frome *v.* Dennis, 45 N. J. 515; Hallahan *v.* R. R., 102 N. Y. 194. In (1) *supra*, "contemporaneous" is not in all cases to be taken in its strictest sense. Though a fact be past, if it is so nearly contemporaneous with the declaration which characterizes and explains it as to exert such a controlling influence on the mind of the speaker that the statement can fairly be taken to be not so much the narrative result of thought as the natural outcome of the circumstances under which it was uttered, it is, in general, admissible. Com. *v.* M'Pike, 3 Cush 181; People *v.* Vernon, 35

Cal. 49; Hanover R. R. Co. *v.* Coyle, 55 Pa. St. 396; Fifield *v.* Richardson, 34 Vt. 410; Little's case, 25 Gratt. 921; Monday *v.* State, 32 Ga. 672; Harriman *v.* Stowe, 57 Mo. 93; Elkins *et al. v.* McKean, 79 Pa. St. 493; Bradberry *v.* State, 22 Tex. App. 273; Ins. Co. *v.* Sheppard, 85 Ga. 751; Lander *v.* People, 104 Ill. 248; Chase *v.* Lowell, 151 Mass. 422; Craig *v.* State, 30 Tex. App. 619; Dismukes *v.* State, 83 Ala. 287; R. R. *v.* Leverett, 48 Ark. 333; Harrison Jones' case, 86 Va. 740; Ins. Co. *v.* Tillman, 84 Tex. 31; State *v.* Stubbs, 108 N. C. 774; Kennedy *v.* R. R., 130 N. Y. 654; Eq. Mut. Assoc. *v.* McCluskey, 1 Col. App. 473; Merkle *v.* Bennington, 58 Mich. 156; U. S. *v.* Nardello, 4 Mackie, 503. See also Ridley *v.* Gyde, 9 Bing. 340; Rawson *v.* Haigh, 2 Bing. 99, 104. Contemporaneousness is not alone sufficient to admit such a statement. Williamson *v.* Cambridge R. R., 144 Mass. 148; R. R. *v.* Groseclose, 88 Va. 267. But see Penna. R. R. *v.* Lyons, 129 Pa. St. 113. The rule has been extended to cover the substance of dying declarations. McInturf *v.* State, 20 Tex. App. 335. But mere narrative will be rejected. Estell *v.* State, 51 N. J. 182; R. R. *v.* Holland, 82 Ga. 257; Doles *v.* State, 97 Ind. 555; Waldele *v.* R. R., 95 N. Y. 274; Armil *v.* R. R., 70 Ia. 130; Pilkinton *v.* R. R., 70 Tex. 226; R. R. *v.* O'Brien, 119 U. S. 99; R. R. *v.* Hammond, 93 Ala. 181; Fordyce *v.* McCants, 51 Ark. 509; Kirby *v.* Com., 77 Va. 681; Petrie *v.* R. R., 27 S. C. 63; Ross *v.* White, 60 Vt. 558; Whitney *v.* Darkin, 48 Cal. 462; Cleveland R. R. Co. *v.* Mara, 26 Oh. St. 185; People *v.* Davis, 56 N. Y. 95, 103; State *v.* Dominique, 30 Mo. 585; Bangor *v.* Brunswick, 27 Me. 351; Rosenbaum *v.* State, 33 Ala. 354; McKinnon *v.* Norcross, 148 Mass. 533. But see R. R. *v.* Robertson, 82 Tex. 657; Drake *v.* State, 29 Tex. App. 265.

(*b*) *Exclamations, &c.* — It would seem to constitute no material difference in this connection whether cries and exclamations are articulate or inarticulate; it being assumed that neither partake of the character of mere narrative, but are, on the contrary, the natural exponents of a bodily or mental state relevant to the issue. 1 Greenl. Ev. § 102; Phillips *v.* Kelly, 29 Ala. 628; Sanders *v.* Reister, 1 Dak. 151; Kearney *v.* Farrell, 28 Conn. 317; Shailer *v.* Bumstead, 99 Mass. 112; Green *v.* Bedell, 48 N. H. 546; Frink *v.* Coe, 4 Greene (Ia.), 555; Denton *v.* State, 1 Swan, 279; Bacon *v.* Charlton, 7 Cush. 581. See also Parker *v.* Steamboat Co., 109 Mass. 449; Hagenlocher *v.* R. R., 99 N. Y. 136; McKeighe *v.* Janesville, 68 Wis. 50; W. U. Tel. Co. *v.* Henderson, 89 Ala. 510; Dowlen *v.* State, 14 Tex. App. 61; Blair *v.* Madison Co., 81 Ia. 313; Harris *v.* Detroit R. R., 76 Mich. 227; Plummer *v.* Ossipee, 59 N. H. 55; Glass *v.* Bennett, 89 Tenn. 478; R. R. *v.* Barron, 78 Tex. 421; Morton *v.* State, 91 Tenn. 437; Continental Car Co. *v.* Pruitt, 65 Tex. 125; Reg. *v.* Peltier, 4 L. C. R. 3. But see Jones *v.* Portland, 88 Mich. 598. For a confusing of *res gestæ* with real evidence, see Williams' case, 85 Va. 607.

(*c*) *Statements to Physicians.* — No physician, in any action for personal injury, will be permitted to testify to statements made to him by the injured party with regard to the locality and nature of the complaint or injury in case such statements are made with a view to indicating the cause of such injury or complaint. Chapin *v.* Marlborough, 9 Gray, 244; Morrissey *v.* Ingham, 111 Mass. 63; State *v.* Belcher, 13 S. C. 459; Gray *v.* McLaughlin, 26 Ia. 279; Roosa *v.* Boston Loan Co., 132 Mass. 439; Collins *v.* Waters, 54 Ill. 485; Denton *v.* State, 1 Swan, 279. But see Harriman *v.* Stowe, 57 Mo. 93, 97, *contra*. In case, however, such physician testify as an expert, he may give in evidence the declarations made to him as constituting the basis of his opinion. It is not, *semble*, necessary that such declarations should be so freshly made as to remove all suspicion of fabrication. State *v.* Gedicke, 43 N. J. L. 86; Barber *v.* Merriam, 11 All. 322; Rogers *v.* Crain, 30 Tex. 289; Ill. Cen. R. R. Co. *v.* Sutton, 42 Ill. 438. So also statements with regard to the nature and *locus* of present suffering made to a physician with a view to medical treatment are admissible. Fay *v.* Harlan, 128 Mass. 244; Matteson *v.* N. Y. Cen. R. R., 62 Barb. 364; Towne *v.* Blake, 48 N. H. 92; Earl *v.* Tupper, 45 Vt. 275; Gray *v.* McLaughlin, 26 Ia. 279; Wilson *v.* Granby, 47 Conn. 59; Thomas *v.* Herrall, 18 Oreg. 546; R. R. *v.* Rosenzweig, 113 Pa. St. 519; Drew *v.* Sutton, 55 Vt. 586; Newman *v.* Dodson, 61 Tex. 91; Fleming *v.* Springfield, 154 Mass. 520; Commissioners *v.* Leggett, 115 Ind. 544. But see Stewart *v.* Everts, 76 Wis. 35. So of similar statements to persons other than physicians. Bacon *v.* Charlton, 7 Cush. 581; Taylor *v.* R. R., 48 N. H. 304; Lush *v.* McDaniel, 13 Ired. L. 485; Gray *v.* McLaughlin, 26 Ia. 279.

(*d*) "*Fresh Complaint.*" — Analogous, in some cases, to the rule governing statements

to a physician is that which admits, in cases of rape, attempts at rape, and assaults with intent to rape, the complaint of the woman. McMurrin *v.* Rigby, 80 Ia. 322. For the general rule in such cases, see 1 Greenl. Ev. § 102; Burt *v.* State, 23 Oh. St. 394; State *v.* Warner, 74 Mo. 83; State *v.* Niles, 47 Vt. 82; Griffin *v.* State, 76 Ala. 29; State *v.* Clark, 69 Ia. 294; Dunn *v.* State, 45 Oh. St. 249. In absence of explanation, delay of eleven months is too great. People *v.* O'Sullivan, 104 N. Y. 481; McMath *v.* State, 55 Ga. 303; Lacy *v.* State, 45 Ala. 80. See also Gardner *v.* Kellogg, 23 Minn. 463. The particulars of such complaint are not evidence. State *v.* Knapp, 45 N. H. 148; State *v.* Jones, 61 Mo. 232; Pefferling *v.* State, 40 Tex. 486. But see State *v.* Kinney, 44 Conn. 153; Burt *v.* State, 23 Oh. St. 394; State *v.* Freeman, 100 N. C. 429; Brown *v.* People, 36 Mich. 203, *contra*. The rule must not be confused with the rule as to *res gestæ*. Such a statement and its particulars may be admissible if part of the *res gestæ*. But the fact of such a statement made at a time later than required by the rule as to *res gestæ* is admissible. The reason is historical, and does not apply to other offences.

(*e*) *Res Gestæ not Hearsay.* — It is usual to say that declarations admitted as part of the *res gestæ* constitute an exception to the rule against "hearsay." It may be doubted whether the hearsay rule has an application. In the great majority of instances the probative force of a statement admissible as part of the *res gestæ* seems not to rest in any appreciable degree on the credit of its maker. Its credit rests on the cogent influence of the circumstances under which it was uttered,— an influence sufficient to largely remove danger of voluntary reflection or invention. It seems, therefore, that such a statement is not strictly within the purview of the "hearsay rule;" and consequently that the rule admitting such statements is not, in strictness, an exception. See § 492, n. 1, *supra;* Cox *v.* State, 8 Tex. Ct. App. 254; Bank *v.* Kennedy, 17 Wall. 19.

(§ 496) *Evidence on Former Trial.* — (*a*) *Rule.* — The oral testimony of a deceased witness in a former action, or in a prior stage of the same action, may be given in evidence by any person who, in the opinion of the judge, is competent to recollect its substance; *provided*, (1) that the party against whom such testimony is offered (or a person identified with him in legal interest) had, at the time such evidence was originally given, the right of cross-examining the deceased witness upon the matters covered by the testimony offered; *and provided*, (2) that the parties to the suit and the questions at issue in the two actions are substantially the same. 1 Greenl. Ev. §§ 163–168; Johnson *v.* Powers, 40 Vt. 611; Orr *v.* Hadley, 36 N. H. 575; Yale *v.* Comstock, 112 Mass. 267; U. S. *v.* Macomb, 5 McLean, 286; Ephraims *v.* Murdock, 7 Blackf. 10; Clealand *v.* Huey, 18 Ala. 343; Earl *v.* Tupper, 45 Vt. 275; Lane *v.* Brainerd, 30 Conn. 565; Hutchins *v.* Corgan, 59 Ill. 70; State *v.* Johnson, 12 Nev. 121; State *v.* Able, 65 Mo. 357; People *v.* Devine, 46 Cal. 45; Pratt *v.* Patterson, 81 Pa. St. 114; Ind. R. R. *v.* Stout, 53 Ind. 143; Goodlett *v.* Kelly, 74 Ala. 213; Solomon R. R. *v.* Jones, 34 Kans. 443; Davis *v.* Kline, 96 Mo. 401; Slingerland *v.* Slingerland, 46 Minn. 100; Thornton *v.* Britton, 144 Pa. St. 126; Patterson *v* Dushane, 137 Pa. St. 23; Jeffries *v.* Castleman, 75 Ala. 262. That issue and parties must be the same, see Marshall *v.* Hancock, 80 Cal. 82; Hughes *v.* Clark, 67 Ga. 19. That there must be an opportunity for cross-examination, see Jackson *v.* Crilly, 16 Col. 103. The evidence is admissible though the witness was dumb, and testified by signs at the former hearing. Quinn *v.* Halbert, 57 Vt. 178. The evidence in a former trial is admissible to refresh recollection. Stone *v.* Ins. Co., 71 Mich. 81; Ruch *v.* Rock Island, 97 U. S. 693. That there were also other parties to the record in the former trial is immaterial. Phila. &c. R. R. Co. *v.* Howard, 13 Howard (U. S.) 307, 332. See also Frye *v.* Gragg, 35 Me. 29; Norris *v.* Monen, 3 Watts, 465; Melvin *v.* Whiting, 7 Pick. 79.

(*b*) *Other Disability.* — Whether such evidence is admissible in any other contingency than the death of the former witness, is a point about which there was at one time some dispute among American authorities. The English common-law rule drew the line strictly at death. Some American cases take the same ground. Chess *v.* Chess, 17 S. & R. 409; Wilbur *v.* Selden, 6 Cowen, 162; LeBaron *v.* Crombie, 14 Mass. 234; Powell *v.* Waters, 17 Johns. 176; Com. *v.* McKenna (Mass.) S. J. C. 1893. See also Drayton *v.* Wells, 1 Nott & McC. 409; State *v.* Staples, 47 N. H. 113; Dupree *v.* Ins. Co., 92 N. C. 417. On the other hand, circumstances practically equivalent to death have been held to admit this evidence. If witness cannot be found; Shearer *v.* Harber, 36 Ind. 536; Shackel-

ford *v.* State, 33 Ark. 539; or is out of the jurisdiction; McGill *v.* Kauffman, 4 S. & R 317; Wright *v.* Cumpsty, 41 Pa. St. 102; Dye *v.* Com., 3 Bush, 3; Sutor *v.* McLean, 18 Q. B. U. C. 490; Wilder *v.* St. Paul, 12 Minn. 192, 206; or is absent on official duty, Noble *v.* Martin, 7 Martin N. s. 282; or is sick and unable to attend; Emig *v.* Diehl, 76 Pa. St. 359, 373; Miller *v.* Russell, 7 Martin N. s. 266; Scoville *v.* R. R., 94 Mo. 84; Whitaker *v.* Marsh, 62 N. H. 477; or is kept away by procurement of the other side; Drayton *v.* Wells, 1 Nott & McC. 409; U. S. *v.* Reynolds, 1 Utah, 319; Williams *v.* State, 19 Ga. 402, — such evidence is admissible. Bergen *v.* People, 17 Ill. 426, *contra.* But the fact that the witness has forgotten his former evidence does not render reported evidence of it admissible. Robinson *v.* Gilman, 43 N. H. 295. Rothrock *v.* Gallaher, 91 Pa. St. 108, *contra.* That a witness cannot be found, is not alone sufficient to admit his evidence on a former trial. It must also appear that due diligence in search has been, or would be, unavailing. State *v.* Staples, 47 N. H. 113; Berney *v.* Mitchell, 34 N. J. L. 337; Dupree *v.* State, 33 Ala. 380; Gerhauser *v.* Ins. Co., 7 Nev. 174; Sullivan *v.* State, 6 Tex. Ct. of App. 319; Slusser *v.* Burlington, 47 Ia. 300. But extraordinary difficulty in attending will serve to admit the evidence. Mins *v.* Sturdevant, 36 Ala. 636. So of a witness who has become incompetent since the former trial. Pratt *v.* Patterson, 81 Pa. St. 114. See also Rundlett *v.* Small, 25 Me. 29, to the effect that such reported evidence is admissible, though the former witness be present in court at the time of second trial.

(c) *Criminal Cases.* — It was at one time supposed that the reported evidence of a deceased witness was inadmissible in criminal cases, — as violating the prisoner's constitutional right "to be confronted with the witnesses against him" (U. S. Const., Amend. VI.). Finn's case, 5 Rand. 701; State *v.* Atkins, 1 Overton (Tenn.), 229; Brogy *v.* Com., 10 Gratt. 722; U. S. *v.* Sterland, 6 Pitts. L. J. 50. See also State *v.* Staples, 47 N. H. 113. The point has, however, been decided *contra.* Williams *v.* State, 19 Ga. 402; Kendrick *v.* State, 10 Humph. 479; Davis *v.* State, 17 Ala. 354; Pope *v.* State, 22 Ark. 372; U. S. *v.* Macomb, 5 McLean, 286; Brown *v.* Com., 73 Pa. St. 321; Summons *v.* State, 5 Oh. St. 325; Barnett *v.* People, 54 Ill. 325; People *v.* Murphy, 45 Cal. 137; Com. *v.* Richards, 18 Pick. 434; State *v.* Able, 65 Mo. 357.

(d) *Exact Words not Essential.* — It has been held that the reporting witness must give the exact language, *ipsissimis verbis,* of the original declarant. U. S. *v.* Wood, 3 Wash. C. Ct. 440; Bliss *v.* Long, Wright (Ohio), 351; Foster *v.* Shaw, 7 S. & R. 156, 163; Wilbur *v.* Selden, 6 Cowen, 162; Com. *v.* Richards, 18 Pick. 434; Warren *v.* Nichols, 6 Metc. 261; Marsh *v.* Jones, 21 Vt. 378; Ephraims *v.* Murdock, 7 Blackf. 10. In most cases this would amount to a practical nullification of the rule. It is accordingly held that only the substance need be given. Ruch *v.* Rock Island, 97 U. S. 693; Johnson *v.* Powers, 40 Vt. 611; Lime Bank *v.* Hewett, 52 Me. 531; Wagers *v.* Dickey, 17 Ohio, 439; Clealand *v.* Huey, 18 Ala. 343; Hepler *v.* Mt. Carmel Bank, 97 Pa. St. 420; Young *v.* Dearborn, 22 N. H. 372; Martin *v.* Cope, 3 Abb. (N. Y.) Ct. of App. 182; Sloan *v.* Somers, 22 N. J. L. 66; Horne *v.* Williams, 23 Ind. 37; Trammell *v.* Hemphill, 27 Ga. 525; Thompson *v.* Blackwell, 17 B. Monr. 609; People *v.* Murphy, 45 Cal. 137; Thurmond *v.* Trammell, 28 Tex. 372. But the recollection of the witness must be substantially full and accurate, covering both the direct and the cross examination, if any. Tibbetts *v.* Flanders, 18 N. H. 284; Woods *v.* Keyes, 14 All. 236; Fell *v.* R. R., 43 Ia. 177; Buie *v.* Carver, 73 N. C. 264; Black *v.* Woodrow, 39 Md. 194; Puryear *v.* State, 63 Ga. 692; Phila. &c. R. R. Co. *v.* Spearen, 47 Pa. St. 300.

(e) *Preliminary Investigations.* — As to how far the evidence of a witness subsequently disqualified, given at a preliminary investigation, can be thus reported, is not entirely settled. In the following cases of preliminary investigation before a magistrate such evidence has been admitted, there having been a right of cross-examination. State *v.* Hooker, 17 Vt. 658; U. S. *v.* Macomb, 5 McLean, 286; Davis *v.* State, 17 Ala. 354; R. *v.* Barber, 1 Root (Conn.), 76; Williams *v.* State, 19 Ga. 402; Brown *v.* Com., 73 Pa. St. 321; Com. *v.* Richards, 18 Pick. 434; Kendrick *v.* State, 10 Humph. 479. But see State *v.* McLeod, 1 Hawks (N. C.), 344; State *v.* Campbell, 1 Rich. (S. C.) 124; Berney *v.* Mitchell, 5 Vroom, 337; Oliver *v.* State, 5 How. (Miss.) 14; Floyd *v.* State, 82 Ala. 16; Sneed *v.* State, 47 Ark. 180; R. R. *v.* O'Connor, 119 Ill. 586. Testimony before arbitrators

is admissible, if the arbitrators had jurisdiction. McAdam's Exec'rs *v.* Stilwell, 13 Pa. St. 90; Bailey *v.* Woods, 17 N. H. 365. *Contra*, Jessup *v.* Cook, 6 N. J. L. 434. So deposition in former trial is admissible if witness is beyond the jurisdiction. Roe *v.* Jones, 3 L. Can. 58.

(*f*) *Proof.* — Testimony given at a former trial may be proved (1) by the recollection of any person otherwise competent then present. Costigan *v.* Lunt, 127 Mass. 354, 356. (2) By contemporaneous notes, stenographic or otherwise, the substantial accuracy of which is vouched for on oath. Johnson *v.* Powers, 40 Vt. 611; Fisher *v.* Kyle, 27 Mich. 454; Sloan *v.* Somers, 20 N. J. L. 66; Rhine *v.* Robinson, 27 Pa. St. 30; Clark *v.* Vorce, 15 Wend. 193; Jones *v.* Ward, 3 Jones (N. C.) L. 24. So of judge's notes. Huff *v.* Bennett, 4 Sandf. 120; Shall *v.* Miller, 5 Whart. 156; Livingstone *v.* Cox, 8 Watts & Serg. 61; Whitcher *v.* Morey, 39 Vt. 459. (3) But not by a statement in a bill of exceptions. Kirk *v.* Mowry, 24 Oh. St. 581. But see Cantrell *v.* Hewlett, 2 Bush (Ky.), 311, *contra*. (4) *It seems* also that the judge before whom the former trial took place may be examined as a witness. See Heyward's case, 1 Sandf. 701, 704; Welcome *v.* Batchelder, 23 Me. 85, 88, Grimm *v* Hamel, 2 Hilt. 434; Zitske *v.* Goldberg, 38 Wis. 216. But see Savard *v.* Vallée, S. C., 4 L. C. R. 85. Mere notes and minutes of testimony are not evidence *per se*; they are admitted to refresh the memory of the witness. Yancey *v.* Stone, 9 Rich. (S. C.) Eq. 429; Lathrop *v.* Adkisson, 87 Ga. 339; Watrous *v.* Cunningham, 71 Cal. 30; Carpenter *v.* Tucker, 98 N. C. 316; Waters *v.* Waters, 35 Md. 531; Zitske *v.* Goldberg, 38 Wis. 216; Sloan *v.* Somers, 20 N. J. L. 66; Brown *v.* Com., 73 Pa. St. 321; Mineral Point R. R. *v.* Keep, 22 Ill. 9. But see Fisher *v.* Kyle, 27 Mich. 454. So of the judge's notes; they must be properly vouched for on oath unless admitted by consent. Miles *v.* O'Hara, 4 Binn. 108; Huff *v.* Bennett, 4 Sandf. 120; Livingstone *v.* Cox, 8 Watts & Serg. 61; Zitske *v.* Goldberg, 38 Wis. 216.

(§ 497) *Declarations as to Public Matters.* — (*a*) *Rule.* — Declarations, in any form, concerning matters of public or general interest, may be given in evidence; *provided*, (1) that such statements are made by persons possessing sufficient opportunities for knowledge and for correction by conflicting discussion; *i. e.*, in case of public interest are members of the public, and in case of general interest are members of the community among which interest in the question under discussion may be assumed to have been general. 1 Greenl. Ev. §§ 127–140; School District *v.* Williams, 48 Conn. 504; Ellicott *v.* Pearl, 10 Pet. 412; McCall *v.* U. S., 1 Dak. 320. And *provided*, (2) that the declarant is dead (or, perhaps, unavailable as a witness). Buchanan *v.* Moore, 10 S. & R. 275; Flagg *v.* Mason, 8 Gray, 556. Such declarations should be *ante litem motam*. Speer *v.* Coate, 3 McCord, 227; Bethea *v.* Byrd, 95 N. C. 309; Hills *v.* Ludwig, 46 Oh. St. 373; Tucker *v.* Smith, 68 Tex. 473. Facts of private interest cannot be proved in this manner, though necessarily involved in matters of general interest. 1 Greenl. Ev. § 138; Shutte *v.* Thompson, 15 Wall. 151; Curtis *v.* Aaronson, 49 N. J. 68; Hunnicut *v.* Peyton, 102 U. S. 333, 362, 363; Wendell *v.* Abbott, 45 N. H. 349. But see Hill *v.* Proctor, 10 W. Va. 59; Clements *v.* Kyles, 13 Gratt. 468, 477; Abington *v.* No. Bridgewater, 23 Pick. 170; Scoggin *v.* Dalrymple, 7 Jones (N. C.) L. 46, *contra*. Local history is not admissible to prove the beginning of private ownership in a certain locality. Roe *v.* Strong, 107 N. Y. 350.

(*b*) *Reputation.* — Such declarations may take the form of general reputation, which is admissible though the declarants are not deceased. Thus, in Massachusetts, the incorporation of a town or parish may in certain cases be proved by reputation. Dillingham *v.* Snow, 5 Mass. 547. So of a public boundary. Cox *v.* State, 41 Tex. 1; Hunnicut *v.* Peyton, 102 U. S. 333, 363; State *v.* Vale Mills, 63 N. H. 4; Clark *v.* Hill, 67 Tex. 141. Reputation is also, to a certain extent, admissible in questions of *private* boundary. The boundaries must be ancient, and the relaxation of the common-law rule strictly construed. 1 Greenl. Ev. § 145; Clements *v.* Kyles, 13 Gratt. 468, 477; Kinney *v.* Farnsworth, 17 Conn. 355, 363; Smith *v.* Nowells, 2 Litt. (Ky.) 159; Hunnicut *v.* Peyton, 102 U. S. 333, 362, 363. So of the statements of deceased witnesses to matters of private boundary. McCausland *v.* Fleming, 63 Pa. St. 36; Royal *v.* Chandler, 83 Me. 150; Child *v.* Kingsbury, 46 Vt. 47; Daggett *v.* Willey, 6 Fla. 462, 510. The extension of the rule probably owes its origin to the fact that an obsolete rule in England admitted general reputation in all cases of prescription, and to the further fact that, in many sections of this country, a single

surveyed boundary line is common to a number of estates, becoming in this manner a *quasi* matter of general interest. Boardman *v.* Reed, 6 Pet. 328; Conn. *et al. v.* Penn. *et al.*, 1 Pet. C. Ct. 496; Clement *v.* Packer, 125 U. S. 309; Ralston *v.* Miller, 3 Rand. 44; Shook *v.* Pate, 50 Ala. 91. In Massachusetts, the rule as to private boundaries is much limited, and involves itself, to some extent, with the principle of the *res gestæ*. Declarations of a deceased owner of land, made while in possession of such land and in the act of pointing out his own boundaries, are admissible; *provided*, there is no interest to misrepresent or mislead. Bartlett *v.* Emerson, 7 Gray, 174; Long *v.* Colton, 116 Mass. 414; Van Deusen *v.* Turner, 12 Pick. 532; Daggett *v.* Shaw, 5 Metc. 223; Flagg *v.* Mason, 8 Gray, 556; Whitney *v.* Bacon, 9 Gray, 206; Holmes *v.* Turner's Falls Co., 150 Mass. 535. The court do not evidence an inclination to extend the rule. Peck *v.* Clark, 142 Mass. 436. See also, to same effect, Smith *v.* Forrest, 49 N. H. 230; Lawrence *v.* Tennant, 64 N. H. 532; Marion *v.* Hoyt, 72 Ga. 117; Quinn *v.* Eagleston, 108 Ill. 248. It is obvious that in many instances such declarations may be admissible on other grounds; *e. g.*, as declarations against proprietary interest. Smith *v.* Forrest, *supra*. Conf. § 500, n. 1, *infra*. Such declarations should also be distinguished from the numerous instances in which the alleged statement is simply original circumstantial evidence; *e. g.*, that the proprietor of land had never heard of a certain easement. Hannefin *v.* Blake, 102 Mass. 297. See also Donahue *v.* Case, 61 N. Y. 631; Brander *v.* Farriday, 16 La. An. 296.

(§ 498) *Declarations concerning Pedigree.* — (*a*) *Rule.* — If genealogy or pedigree be a fact in issue or relevant thereto, declarations in any form, by deceased members of the family in question, or the deceased husband or wife of any such person, are admissible in evidence to establish the descent, relationship, birth, marriage, or death of other members of the family, together with the dates, places, and other circumstances relating thereto, — 1 Greenl. Ev. § 103, — *provided*, such declarations be made *ante litem motam*. Craufurd *v.* Blackburn, 17 Md. 49; s. c. on appeal, 3 Wall. 175; No. Brookfield *v.* Warren, 16 Gray, 171; Wise *v.* Wynn, 59 Miss. 588; Du Pont *v.* Davis, 30 Wis. 170; Kelly *v.* McGuire, 15 Ark. 555; Anderson *v.* Parker, 6 Cal. 197; Moffit *v.* Witherspoon, 10 Ired. (N. C.) L. 185; De Haven *v.* De Haven, 77 Ind. 236; Mason *v.* Fuller, 45 Vt. 29; Cuddy *v.* Brown, 78 Ill. 415; Jones *v.* Jones, 36 Md. 447, 457; Walker *v.* Murray, 5 Ont. Rep. 638; Wallbridge *v.* Jones, 33 Q. B. U. C. 613; Harland *v.* Eastman, 107 Ill. 535; De Haven *v.* De Haven, 77 Ind. 236; Dupoyster *v.* Gagani, 84 Ky. 403; Northrop *v.* Hale, 76 Me. 306; Gehr *v.* Fisher, 143 Pa. St. 311; Fowler *v.* Simpson, 79 Tex. 611; Dawson *v.* Mayall, 45 Minn. 408; Eisenlord *v.* Clum, 126 N. Y. 552. Rule does not apply to pedigree of animals. Maier *v.* Randolph, 33 Kans. 340. Relationship to the family is to be proved by evidence *aliunde*. Dunlop *v.* Servos, 5 Q. B. U. C. 284.

Such declarations are not admissible to establish pedigree, or matters collateral thereto, in cases where pedigree itself is not directly relevant. Londonderry *v.* Andover, 28 Vt. 416; Union *v.* Plainfield, 39 Conn. 563; Independence *v.* Pompton, 3 Halst. 209; Wilmington *v.* Burlington, 4 Pick. 174; Adams *v.* Swansea, 116 Mass. 591. But see Wilson *v.* Brownlee *et al.*, 24 Ark. 586. That such declarations may extend to particular facts incident to pedigree, — dates, localities, and the like, — see Morrill *v.* Foster, 33 N. H. 379; Amer. Life Ins. Co. *v.* Rosenagle, 77 Pa. St. 507, 516; Du Pont *v.* Davis, 30 Wis. 170; Currie *v.* Stairs, 25 New Bruns. 4. That the declarant must in all cases be dead to render his declaration admissible, see White *v.* Strother, 11 Ala. 720; Mooers *v.* Bunker, 29 N. H. 420; Robinson *v.* Blakely, 4 Rich. (S. C.) 586; Greenleaf *v.* R. R., 30 Ia. 301. See also Covert *v.* Hertzog, 4 Barr, 145; Carskadden *v.* Poorman, 10 Watts, 82.

(*b*) *Who are Qualified.* — The declarant must be related to the subject of the declaration, either by blood or marriage. Jewell *v.* Jewell, 17 Pet. 213, 221; Tyler *v.* Flanders, 57 N. H. 618; Chapman *v.* Chapman, 2 Conn. 347; Armstrong *v.* McDonald, 10 Barb. 300; Carnes *v.* Crandall, 10 Ia. 377; Conn. Mut. Life Ins. Co. *v.* Schwenk, 94 U. S. 593. A wife's sister is not allowed to testify concerning the pedigree of the husband's family. Blackburn *v.* Crawfords, 3 Wall. 175. See also People *v.* Fulton Fire Ins. Co., 25 Wend. 205. The rule does not extend to a trusted family servant. Doe *v.* Auldjo, 5 Q. B. U. C. 171. Relationship must be shown by evidence *aliunde*. Doe *v.* Servos, 5 Q. B. U. C. 284; Lamoreaux *v.* Atty-Gen. 89 Mich. 147.

Declarations concerning pedigree are admissible in all cases if the declarant be properly qualified, though it be "hearsay of hearsay." The jury are judges of its weight under proper instructions from the court. Cope *v.* Pearce, 7 Gill, 247; Clements *v.* Hunt, 1 Jones (N. C.) L. 400; Elliott *v.* Peirsol, 1 Pet. 328, 337; Eaton *v.* Tallmadge, 24 Wis. 217; Lauter *v.* Schluter, 78 Tex. 103. Reputation in the family is equally admissible with direct statements by deceased members. Morgan *v.* Purnell, 4 Hawks (N. C.), 95; Henderson *v.* Cargill, 31 Miss. 367, 409; Barnum *v.* Barnum, 42 Md. 251; Van Sickle *v.* Gibson, 40 Mich. 170; Doe *v.* Auldjo, 5 Q. B. U. C. 171. That the evidence of parents is more valuable than entry in a family Bible, see Dobson *v.* Cothran, 34 S. C. 518.

(*c*) *Lis mota.* — The declaration must be *ante litem motam.* Caujolle *v.* Ferrie, 26 Barb. 177; Ellicott *v.* Pearl, 10 Pet. 412; Morgan *v.* Purnell, 4 Hawks, 95. The phrase *ante litem motam* is, it seems, to be translated "before the arising of actual controversy" on the point covered by the declaration. By Roman law *lis mota* was the beginning of trial. The common law apparently includes in the phrase the controversy which culminates in such actual litigation, but, *semble*, it does not include the mere existence of the state of facts which renders such a controversy a thing naturally to be apprehended. 1 Greenl. Ev. §§ 104, n., 131–134; 1 Whar. Ev. §§ 193, 213.

(*d*) *Form of Declaration.* — The form of declaration, or the manner of its preservation, is immaterial. Thus, recognition in a will has been held admissible. Gaines *v.* New Orleans, 6 Wall. 642; Shuman *v.* Shuman, 27 Pa. St. 90; Pearson *v.* Pearson, 46 Cal. 609. So of a recital in a deed. Jackson *v.* Corley, 8 Johns. 128; Carter *v.* Tinicum Fishing Co., 77 Pa. St. 310; Stokes *v.* Dawes, 4 Mason, 268. So of inscriptions on tombstones. No. Brookfield *v.* Warren, 16 Gray, 171; State *v.* Patterson, 95 Mo. 525; Eastman *v.* Martin, 19 N. H. 152. Entries in a family Bible or other family record, — Watson *v.* Brewster, 1 Pa. St. 381; Greenleaf *v.* R. R., 30 Ia. 301; So. Life Ins. Co. *v.* Wilkinson, 53 Ga. 535; Whitcher *v.* McLaughlin, 115 Mass. 167, — correspondence in the family, and even loose papers have been held admissible. Howard *v.* Russell, 75 Tex. 171; Swink *v.* French, 11 Lea, 78. See also State *v.* Joest, 51 Ind. 287.

(*e*) *Reason of the Rule.* — It is said that such evidence is admissible from the necessity of the case. The reasoning proves too much if applied to the hearsay rule. The exception probably rests on the supposed accuracy of impressions where accuracy is of general interest, and where family pride, family discussion, and the influence of conflicting views and interests assist in the correction of mistake. Chamberlain *v.* Chamberlain, 71 N. Y. 423. Where, therefore, the claim and question is one of illegitimacy, such declarations are not allowed, the subject not being a natural topic of general discussion and consequent mutual correction. See State *v.* Watters, 3 Ired. (N. C.) L. 455; Watts *v.* Owens, 62 Wis. 512.

The existence of a reputation or course of action in the family may have an evidentiary force as original circumstantial evidence. The "hearsay rule" in such cases has clearly no application. 1 Greenl. Ev. §§ 106, 134; Gaines *v.* Green Pond Co., 32 N. J. Eq. 86, 95–98; White *v.* Strother, 11 Ala. 720.

(§ 499) *Declarations concerning Ancient Possession.* — (*a*) *Rule.* — Ancient documents (documents thirty years old), apparently exercising acts of ownership, are admissible as evidence of such acts, *provided* such documents are from proper custody. 1 Greenl. Ev. §§ 141–146; 1 Whar. Ev. §§ 194–199; Boston *v.* Richardson, 105 Mass. 351, 371; Hewlett *v.* Cock, 7 Wend. 371; Clarke *v.* Courtney, 5 Pet. 319, 344; Duncan *v.* Beard, 2 Nott & McC. 400; Goodwin *v.* Jack, 62 Me. 414; Willetts *v.* Mandlebaum, 28 Mich. 521; Whitman *v.* Heneberry, 73 Ill. 109; Hathaway *v.* Evans, 113 Mass. 264. See also Floyd *v.* Tewksbury, 129 Mass. 362; Thompson *v.* Bennett, 22 C. P. U. C. 393; Harlan *v.* Howard, 79 Ky. 373; Havens *v.* Shore Co, 47 N. J. E. 365; Woods *v.* Bonner, 89 Tenn. 411; Bell *v.* Brewster, 44 Oh. St. 690; Wilson *v.* Simpson, 80 Tex. 279; Polson *v.* Ingram, 22 S. C. 541; Williams *v.* Conger, 125 U. S. 397. In Alabama, twenty years is sufficient. Woods *v.* Montevallo Co., 84 Ala. 560.

(*b*) *Corroboration.* — It has been held that the documents must be corroborated by proof of actual possession. Middleton *v.* Mass, 2 Nott & McC. 55; Carroll *v.* Norwood, 1 Har. & J. 167, 174; Shaller *v.* Brand, 6 Binn. 435, 439; Doe *v.* Phelps, 9 Johns. 169, 171. The point, it seems, has been decided *contra.* Whitman *v.* Heneberry, 73 Ill. 109; Gardner *v.*

Granniss, 57 Ga. 539; Brown *v.* Wood, 6 Rich. (S. C.) Eq. 155; Barr *v.* Gratz, 4 Wheat. 213, 221; Ammons *v.* Dwyer, 78 Tex. 639; Jackson *v.* Lamb, 7 Cowen, 431. But see Willson *v.* Betts, 4 Denio, 201. Conf. § 497, n. 1, *supra*. Such documents may be impeached for forgery. Chamberlain *v.* Torrance, 14 Grant's Ch. Rep. 181. Copies of such deeds do not prove themselves. Schunior *v.* Russell, 83 Tex. 83; Woolfolk *v.* Mfg. Co., 22 S. C. 333; Woods *v.* Bonner, 89 Tenn. 411.

(§ 500) *Declarations against Interest.* — (*a*) *Rule.* — Declarations of a deceased person, made either orally or in writing, are admissible if against or in derogation of his pecuniary or proprietary interest. Livingston *v.* Arnoux, 56 N. Y. 507, 519; Gilchrist *v.* Martin, 1 Bailey (S. C.) Eq. 492; Beedy *v.* Macomber, 47 Me. 451; Peace *v.* Jenkins, 10 Ired. (N. C.) Law, 355; Ringo *v.* Richardson, 53 Mo. 385; Field *v.* Boynton, 33 Ga. 239; Coleman *v* Frazier, 4 Rich. (S. C.) 146; Taylor *v.* Gould, 57 Pa. St. 152; Hart *v.* Kendall, 82 Ala. 144; Tyres *v.* Kennedy, 126 Ind. 523; Roberts' Appeal, 126 Pa. St. 102; Williams *v.* Mower, 29 S. C. 332; Heidenheimer *v.* Johnson, 76 Tex. 200; Ganton *v.* Size, 22 Q. B. U. C. 473; Wardrope *v.* R. R., 7 Ont. Rep. 321, 329; Perkins *v.* Towle, 59 N. H. 583; Ellis *v.* Harris, 106 N. C. 395; Wilson *v.* Simpson, 80 Tex. 279; Wilson *v.* Albert, 89 Mo. 537; Royal *v.* Chandler, 79 Me. 265; Hosford *v.* Rowe, 41 Minn. 245; McGee *v.* Blankenship, 95 N. C. 563; Bartlett *v.* Patton, 33 W. Va. 72; Turner *v.* Dewan, 41 Q. B. U. C. 361. Such declarations are not conclusive against party. They may be explained. Raymond *v.* Cummings, 1 P. & B. (New Bruns.) 544. Bind personal representatives. Hurlburt *v.* Hurlburt, 128 N. Y. 420. The declarant must be dead: equivalent disability does not render such declarations admissible. Fitch *v.* Chapman, 10 Conn. 8; Rand *v.* Dodge, 17 N. H. 343, 359; Currier *v.* Gale, 14 Gray, 504; Lowry *v.* Moss, 1 Strobh. 63; Humes *v.* O'Bryan, 74 Ala. 64; Trammell *v.* Hudmon, 78 Ala. 222. Incapacity to testify is not sufficient. Harriman *v* Brown, 8 Leigh, 697; Bowen *v.* Chase, 98 U. S. 254. See also Bird *v.* Hueston, 10 Oh. St. 418.

(*b*) *Scope of Rule.* — In this country the "interest," as in England, must be proprietary or pecuniary. Com. *v.* Chabbock, 1 Mass. 144; Tate *v.* Tate's Exec'rs, 75 Va. 522, 532; Ward *v.* Ward, 37 Mich. 253; Poorman *v.* Miller, 44 Cal. 269; West. Md. R. R. Co. *v.* Manro, 32 Md. 280; Helm *v.* State, 67 Miss. 562. But see Coleman *v.* Frazier, 4 Rich. (S. C.), 146 (*semble*), *contra*. See also Allegheny *v.* Nelson, 25 Pa. St. 332; Blake *v.* Everett, 1 All. 248. Such declarations must be made while owning the interest. Hutchins *v.* Hutchins, 98 N. Y. 56. So the confession of a third party on his death-bed that he killed deceased is not admissible in favor of accused. West *v.* State, 76 Ala. 98. In Massachusetts a peculiar rule prevails. Declarations against pecuniary interest, as well as entries in the course of business, must be in writing, and consist of a book-entry. Framingham Manuf. Co. *v.* Barnard, 2 Pick. 532; Lawrence *v.* Kimball, 1 Metc. 524. In case of proprietary interest, however, oral declarations are admissible. Marcy *v.* Stone, 8 Cush. 4. In general, it is sufficient if the declaration be *prima facie* against the interest of the declarant; the declaration is admissible, though in certain contingencies it may enure to his direct advantage. But see Libby *v.* Brown, 78 Me. 492; Ganton *v.* Size, 22 Q. B. U. C. 473; Ins. Co. *v.* O'Donnell, 13 Can. Sup. Ct. 218, 225. In England it has been found necessary to modify the rule regarding collateral advantage in a certain class of cases; viz., where indorsements of payment are made by the payee or holder of a bill of exchange, promissory note, bond, or other specialty, with the effect of taking such instrument out of the statute of limitations. Conf. 9 Geo. 4, c. 14, § 3. The same result has been attained in this country by judicial legislation. Such indorsements cannot be admitted unless proved to have been written at a time when they must necessarily have been against the interest of the indorser. Roseboom *v.* Billington, 17 Johns. 182; Coffin *v.* Bucknam, 3 Fairf. 471; Beatty *v.* Clement, 12 La. An. 82; Addams *v.* Seitzinger, 1 Watts & Serg. 243. A declaration against interest is evidence of collateral matters therein stated, though such collateral statements be not against the interest of the declarant. Jones *v.* Howard, 3 All. 223; Sherman *v.* Crosby, 11 Johns. 70.

(*c*) *Receipts.* — It is on this principle that a receipt of payment of judgment is admissible evidence. Sherman *v.* Crosby, 11 Johns. 70. So also, in auditing accounts by a court, receipts of payment are admitted as *prima facie* conclusive. Shearman *v.* Akins, 4 Pick. 283, 293.

This exception to the hearsay rule has been seriously affected in development in this country, (1) by the rule which admits an otherwise inadmissible instrument to "refresh the memory" of the witness (see § 224, n. 1, *supra*), and (2) by the great extension of the rules admitting declarations in the course of business or as part of the *res gestæ*.

(§ 501) *Declarations in Course of Business.* — (*a*) *Rule.* — Oral declarations or written entries by deceased persons made in course of professional, official, or other duty or business, are admissible in evidence, as an exception to the hearsay rule. 1 Whar. Ev. § 238 *et seq.*; 1 Greenl. Ev. §§ 116, 120; Chaffee *v.* U. S., 18 Wall. 516, 541; Kennedy *v.* Doyle, 10 All. 161; Rindge *v.* Walker, 61 N. H. 58; Livingston *v.* Arnoux, 56 N. Y. 507, 519; Augusta *v.* Windsor, 19 Me. 317; State *v.* Phair, 48 Vt. 366; Walker *v.* Curtis, 116 Mass. 98; Fisher *v.* Mayor, 67 N. Y. 73, 77; Field *v.* Boynton, 33 Ga. 238; Avery *v.* Avery, 49 Ala. 193; Macomb *v.* Wilkinson, 83 Mich. 486; Culver *v.* Marks, 122 Ind. 554; Sitler *v.* Gehr, 105 Pa. St. 577; State *v.* Hopkins, 56 Vt. 250. See also Barton *v.* Dundas, 24 Q. B. U. C. 273. But see Bland *v.* Warren, 65 N. C. 372, to the effect that such declarations, if self-serving, are not admissible. So of a baptismal record. Durfee *v.* Abbott, 61 Mich. 471.

(*b*) *Declarations must be Contemporaneous.* — If such a declaration take the form of a written entry, the entry must be contemporaneous with the events to which it relates. Chaffee *v.* U. S., 18 Wall. 516; Clark *v.* Magruder, 2 H. & J. 77; Kennedy *v.* Doyle, 10 All. 161, 168; Ray *v.* Castle, 79 N. C. 580; Burley *v.* Bank, 111 U. S. 216. But recourse to the original memoranda from which the entry was made is not required. Redlich *v.* Baurlee, 98 Ill. 134. But see James *v.* Wharton, 5 McLean, 492; Cresswell *v.* Slack, 86 Ia. 110; to the effect that the entry should be the original, and not a copy. Rule does not include a diary. Costello *v.* Crowell, 139 Mass. 588. The entry, moreover, must be based on the personal knowledge of the declarant. Chaffee *v.* U. S., 18 Wall. 516; Lewis *v.* Kramer, 3 Md. 265. But see Stettauer *v.* White, 98 Ill. 72.

(*c*) *Other Disability.* — The strict requirement that the declarant must be deceased to admit his declaration has been relaxed so far as to consider the equivalent disability of insanity or absence from the jurisdiction as sufficient. New Haven, &c. Co. *v.* Goodwin, 42 Conn. 230; North Bank *v.* Abbott, 13 Pick. 465; McDonald *v.* Carnes, 90 Ala. 147; Vinal *v.* Gilman, 21 W. Va. 301; Parker *v.* Nickerson, 137 Mass. 487; Elliott *v.* Dycke, 78 Ala. 150. But see State *v.* Hopkins, 56 Vt. 250; Reynolds *v.* Sumner, 126 Ill. 58; Terry *v.* Nat. Bk., 93 Ala. 599; Taylor *v.* R. R., 80 Ia. 431, *contra*. It has even been held that the entry is admissible, though its maker be alive and subject to the jurisdiction of the court. Chaffee *v.* U. S., 18 Wall. 516; Shove *v.* Wiley, 18 Pick. 558; Fennerstein's Champagne, 3 Wall. 145.

(*d*) *Modern Extension of the Rule.* — The rule has been further extended, in some instances, to all writings made in course of business and without motive to deceive. Guy *v.* Mead, 22 N. Y. 462; Fennerstein's Champagne, 3 Wall. 145. For an opinion that the scope of the rule should not be extended, see Estate of Ward, 73 Mich. 220. As compared with the English decisions on this subject, the rule has received a marked extension in this country, its development being largely affected by the coexistence of several very sweeping rules on kindred subjects, more especially those regulating the evidence of "shop-books" (§ 503, n. 1, *infra*) and the admissibility of documents to "refresh the memory" of a witness (§ 224, n. 1, *supra*).

Professor Greenleaf (1 Greenl. Ev. §§ 116, 120) considers such declarations in course of business to be part of the *res gestæ*.

(§ 503) *Shop-Books.* — (*a*) *Rule.* — In New England, and to a certain extent in other sections of the country, the shop-books of tradesmen and handicraftsmen are evidence of the delivery of goods, the payment of money, or the performance of work, to a limited amount. 1 Greenl. Ev. §§ 117-119; 3 Dane's Abr. ch. 81, art. 4, p. 318; Ball *v.* Gates, 12 Metc. 491; Karr *v.* Stivers, 34 Ia. 123; White *v.* Whitney, 82 Cal. 163; Baldridge *v.* Penland, 68 Tex. 441; Linnell *v.* Sutherland, 11 Wend. 568; Burleson *v.* Goodman, 32 Tex. 229. *Provided*, (1) the court be satisfied by inspection that the books are fairly kept as a contemporaneous and *bona fide* record of daily business. Davis *v.* Sanford, 9 All. 216; Wilson *v.* Wilson, 1 Halst. 95; Terrill *v.* Beecher, 9 Conn. 344; Funk *v.* Ely, 45 Pa. St. 444; R. R. *v.* Provine, 61 Miss. 288; Myer *v.* Grafflin, 31 Md. 350; Burleson *v.* Goodman.

32 Tex. 229; Richardson *v.* Emery, 23 N. H. 220; Robinson *v.* Dibble's Admr., 17 Fla. 457. The book must be one of account; check-stubs have been rejected. Wilson *v.* Goodin, Wright, 219. So also an invoice-book. Cooper *v.* Merrill, 4 Yeates, 341. So of a memorandum-book. Hancock *v.* Hintrager, 60 Ia. 374; and a cash-book, Smith *v.* Rentz, 131 N. Y. 169. See also Hart *v.* Livingston, 29 Ia. 217. *And provided,* (2) that such book be verified by the suppletory oath of the book-keeper, whether the party himself or a clerk. If such book-keeper be deceased, proof of his handwriting or other verification is required. Harwood *v.* Mulry, 8 Gray, 250; Marsh *v.* Case, 30 Wis. 531; Douglass *v.* Hart, 4 McCord, 257; Gilchrist *v.* Grocers' Assoc., 59 N. Y. 495; Bartholomew *v.* Farwell, 41 Conn. 109; Cheever *v.* Brown, 30 Ga. 904; Hoover *v.* Gehr, 62 Pa. St. 136; Patrick *v.* Jack, 82 Ill. 81; Robinson *v.* Dibble's Admr., 17 Fla. 457. See also Kent *v.* Garvin, 1 Gray, 148. Disability practically equivalent to death will suffice to admit such secondary verification. New Haven, &c. Co. *v.* Goodwin, 42 Conn. 230; Holbrook *v.* Gay, 6 Cush. 215. In case such books are offered by an executor or other person suing in a representative capacity, it is usual to require the additional oath of such executor or other person. Holbrook *v.* Gay, 6 Cush. 215; Robinson *v.* Dibble's Admr., 17 Fla. 457.

(*b*) *Oath and Form of Entry.* — The oath required is not that of a witness; it simply verifies the book, and is analogous to the *semi-plena* and *plena probatio* of the civil law. Frye *v.* Barker, 2 Pick. 65; Union Bank *v.* Knapp, 3 Pick. 96; 1 Mascard. de Prob. quæst. 11, n. 1, 4; Code de Commerce, liv. 1, tit. 2, art. 8–12; Bell's Dig. pp. 378, 898. The form in which such books are kept is not deemed essential, it being ascertained that they are books of original entry, and bear no evidence of fraudulent alteration. Swain *v.* Cheney, 41 N. H. 232; Thomson *v.* Porter, 4 Strobh. Eq. 58; Woodbury *v.* Woodbury, 50 Vt. 152; Bentley *v.* Ward, 116 Mass. 333; Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Kotwitz *v.* Wright, 37 Tex. 82; Wall *v.* Dovey, 60 Pa. St. 212. It is not material that the book of original entry is kept in ledger form. Wells *v.* Hatch, 43 N. H. 246; Hoover *v.* Gehr, 62 Pa. St. 136. See also Bonnell *v.* Mawha, 37 N. J. L. 198. The original memoranda are not required. Landis *v.* Turner, 14 Cal. 573; Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Hall *v.* Glidden, 39 Me. 445; Pillsbury *v.* Locke, 43 N. H. 96; Hoover *v.* Gehr, 62 Pa. St. 136. But see Breinig *v.* Meitzler, 23 Pa. St. 156.

(*c*) *Entry must be Contemporaneous.* — The entry, however, must be reasonably contemporaneous with the transaction to which it relates. Henshaw *v.* Davis, 5 Cush. 145; Landis *v.* Turner, 14 Cal. 573; Bentley *v.* Ward, 116 Mass. 333; Bay *v.* Cook, 22 N. J. L. 343, 353; Yearsley's Appeal, 48 Pa. St. 531. Entries posted from memoranda given by servants of the delivery of goods have been held inadmissible if made later than the succeeding day. Cook *v.* Ashmead, 2 Miles (Pa.), 268. But see Morris *v.* Briggs, 3 Cush. 342; Barker *v.* Haskell, 9 Cush. 218; Hall *v.* Glidden, 39 Me. 445, *contra.* Where goods are delivered by A. and charged by B., both are necessary witnesses. Miller *v.* Shay, 145 Mass. 162; Leslie *v.* Hanson, 12 New Bruns. Rep. 263. But see Mayor *v.* Second Ave. R. R., 102 N. Y. 572.

(*d*) *Scope of Rule.* — The rule admits only transactions of a small amount, — usually forty English shillings or its equivalent in American money. Burns *v.* Fay, 14 Pick. 8, 12; Bustin *v.* Rogers, 11 Cush. 346; Davis *v.* Sanford, 9 All. 216; Kelton *v.* Hill, 58 Me. 114; Alexander *v.* Smoot, 13 Ired. (N. C.) L. 461; Rich *v.* Eldredge, 42 N. H. 153. But see Charlton *v.* Lawry, 1 Martin (N. C.), 26; Ducoign *v.* Schreppel, 1 Yeates, 347, *contra.* The rule does not extend to the proof of more important or merely collateral matters. Rindge *v.* Breck, 10 Cush. 43; Lynch *v.* Cronan, 6 Gray, 531; Wilmer *v.* Israel, 1 Browne (Pa.), 257; Somers *v.* Wright, 114 Mass. 171. It has been held that it could be shown to whom credit was given in such an entry. Gilbert *v.* Porter, 2 Kerr, New Bruns. 390. The declarant, moreover, must be a tradesman or handicraftsman, and the entries in the usual course of daily business. Shoemaker *v.* Kellog, 11 Pa. St. 310; Karr *v.* Stivers, 34 Ia. 123; Carman *v.* Dunham, 6 Halst. 189; Cole *v.* Dial, 8 Tex. 347; Boyd *v.* Ladson, 4 McCord, 76. Probably the rule concerning "shop-books" extends to books of account, kept by attorneys, physicians, and other professional men. Charlton *v.* Lawry, 1 Martin (N. C.), 26; Briggs *v.* Georgia, 15 Vt. 61; Codman *v.* Caldwell, 31 Me. 560; Bay *v.* Cook, 22 N. J. L. 343; Toomer *v.* Gadsden, 4 Strobh. (S. C.) 193; Ganahl *v.* Shore, 24 Ga. 17.

But see Richardson *v.* Dorman, 28 Ala. 679; Hale *v.* Ard, 48 Pa. St. 22, *contra.* Secondary evidence of original entries has been held admissible on the ordinary principles of documentary evidence. § 215, n. 1, C. III. (*a*), *supra;* Ins. Co. *v.* Weide, 9 Wall. 677.

(*e*) *Statutory Modifications.* — The common-law rule of shop-books has been extended by statute, in a more or less modified form, to many parts of this country. Neville *v.* Northcutt, 7 Cold. 294; Morse *v.* Congdon, 3 Mich. 549; Anderson *v.* Ames, 6 Ia. 486; Ganahl *v.* Shore, 24 Ga. 17; Alexander *v.* Smoot, 13 Ired. (N. C.) L. 461. Conf. 1 Greenl. Ev. § 118, n. 1. The law of shop-books has been also modified by statutory provisions allowing parties to be witnesses. The book is at present commonly admitted to refresh the memory of the witness, the character of whose oath has entirely been changed. Nichols *v.* Haynes, 78 Pa. St. 174. See also Stroud *v.* Tilton, 4 Abb. Ct. App. Dec. 324; Price *v.* Garland, 3 N. M. 285; Baldridge *v.* Penland, 68 Tex. 441.

The peculiar exception to the hearsay rule concerning "shop-books" is probably a survival, as stated in the text, of statutory provisions, now practically obsolete in England (Stat. 7 Jac. 1, c. 12; 1 Eng. Rev. Stat. 691), to the effect that in petty trading shop-books are not evidence of the debts therein stated after one year. The ordinary limitation to forty shillings (or its equivalent in American currency) may most probably be referred to the law of the so-called Courts of Request or "Courts of Conscience" (3 Jac. 1, c. 15; 9 & 10 Vict. c. 95), established in England for the summary collection, upon oath of the creditor, of petty debts to the amount of forty shillings. This was a relaxation of the rigid rules of the superior courts rejecting parties as witnesses. The colonists kept the courts and the limit of jurisdiction (conf. Plymouth Colony Law, p. 129, A. D. 1660), but extended the rule, as a rule of evidence, to all courts whatever.

(§ 505) *Dying Declarations.* — (*a*) *Rule.* — In trials for homicide declarations by the person whose death is the subject of investigation concerning its cause or attendant circumstances are admissible; *provided,* the court be satisfied that such declarations were made in solemn contemplation of immediately approaching death. 1 Greenl. Ev. § 156, *et seq.;* Whar. Hom. §§ 742–775; State *v.* Cornish, 5 Harr. (Del.), 502; Bull *v.* Com., 14 Gratt. 613; Hill *v.* State, 41 Ga. 484; Dixon *v.* State, 13 Fla. 636; State *v.* Simon, 50 Mo. 370; People *v.* Hodgdon, 55 Cal. 72; State *v.* Swift, 57 Conn. 496; Archibald *v.* State, 122 Ind. 122; State *v.* O'Brien, 81 Ia. 88; Peak *v.* State, 50 N. J. 179; State *v.* Pool, 20 Oreg. 150; State *v.* Banister, 35 S. C. 290; Miller *v.* State, 27 Tex. App. 63; Temple *v.* State, 15 Tex. App. 304; Puryear's case, 83 Va. 51; Sullivan *v.* Com., 93 Pa. St. 284, 296; State *v.* Patterson, 45 Vt. 308; West *v.* State, 7 Tex. Ct. App. 150. The charge must be the death of the declarant; such evidence is not admissible on the statutory charge of procuring an abortion, though death result from the illegal act. People *v.* Davis, 56 N. Y. 95; State *v.* Harper, 35 Oh. St. 78; Railing *v.* Com., 110 Pa. St. 100. See also Hudson *v.* State, 3 Cold. 355.

(*b*) *Form of Declaration.* — The form of declaration is immaterial. If in writing (State *v.* Medlicott, 9 Kans. 257, 282), the declaration is, it has been held, a document within the provisions of § 215, n. 1, C. III., *infra,* and must, if existing, be produced. State *v.* Cameron, 2 Chand. (Wis.) 172; People *v.* Glenn, 10 Cal. 32; State *v.* Tweedy, 11 Ia. 350; Collier *v.* State, 20 Ark. 36; Krebs *v* State, 8 Tex. Ct. of App. 1. But see State *v.* Sullivan, 51 Ia. 142, *contra.* See also 1 Greenl. Ev. § 90; State *v.* Patterson, 45 Vt. 308; State *v.* Arnold, 13 Ired. (N. C.) L. 184; Mockabee *v.* Com., 78 Ky. 380; Hammil *v.* State, 90 Ala. 577; Hines *v.* Com., 90 Ky. 64; Beets *v.* State, 1 Meigs (Tenn.), 106; People *v.* Vernon, 35 Cal. 49; Binns *v.* State, 46 Ind. 311. The declaration may be by signs, or any other method of expressing thought. Com. *v.* Casey, 11 Cush. 417, 421.

(*c*) *Approaching Death.* — A general rule in this country, as in England, is that the knowledge of instantly approaching death is matter of proof, not of inference or presumption. Com. *v.* Cooper, 5 All. 495; Montgomery *v.* State, 11 Ohio, 424; Morgan *v.* State, 31 Ind. 193; People *v.* Grunzig, 1 Parker, C. R. 299; Brakefield *v.* State, 1 Sneed, 215; People *v.* Perry, 8 Abb. (N. Y.) Prac. N. S. 27, 34; Lewis *v.* State, 9 Sm. & M. (Miss.) 115; Reg. *v.* Peltier, 4 L Can. R. 3. But see Dunn *v.* State, 2 Pike, 229; People *v.*

Sanchey, 24 Cal. 17; Murphy *v.* People, 37 Ill. 447, 456; Kilpatrick *v.* Com., 31 Pa. St. 198, 215; Hill *v.* Com., 2 Gratt. 594, 601; Dumas *v.* State, 62 Ga. 58, *contra*. It is not necessary that deceased should have stated an expectation of death. Wills *v.* State, 74 Ala. 21. But if deceased believed he had the slightest chance of recovery, the declaration is inadmissible. Com. *v.* Roberts, 108 Mass. 296. See also Com. *v.* Haney, 127 Mass. 455. Whether death actually follow as expected, is immaterial. Oliver *v.* State, 17 Ala. 587; State *v.* Oliver, 2 Houst. (Del.) 585; Jones *v.* State, 71 Ind. 66; Baxter *v.* State, 15 Lea, 657; Com. *v.* Cooper, 5 All. 495; State *v.* Center, 45 Vt. 378; State *v.* Daniel, 31 La. An. 91. But see Kilpatrick *v.* Com., 31 Pa. St. 198, 215. On the other hand, the rapid succession of death, if unexpected, does not make such declaration admissible. People *v.* Hodgdon, 55 Cal. 72.

(*d*) *Scope of Rule.* — It has been held that a dying declaration of one whose death is not in issue is admissible. State *v.* Terrell, 12 Rich. (S. C.) 321; State *v.* Wilson, 23 La. An. 558. But see State *v.* Westfall, 49 Ia. 328; Brown *v.* Com., 73 Pa. St. 321; State *v.* Fitzhugh, 2 Oreg. 227; Brabston *v.* State, 68 Miss. 208; Hudson *v.* State, 3 Cold. 355, *contra*. Conf. State *v.* Wagner, 61 Me. 178; Com. *v.* Dunsmore, 12 All. 535. This is a distinct departure; the cases can perhaps be most easily explained on the doctrine of the *res gestæ* (§ 495, n. 1, *supra*). Such declarations are admissible either for or against the accused. Hurd *v.* People, 25 Mich. 405; Moore *v.* State, 12 Ala. 764. The circumstances of the death are the sole subject-matter of the declaration. Ben *v.* State, 37 Ala. 103; State *v.* Shelton, 2 Jones (N. C.), 360; Lieber *v.* Com., 9 Bush, 11; Hackett *v.* People, 54 Barb. 370. But see Donnelly *v.* State, 26 N. J. L. 463, 496; State *v.* Terrell, 12 Rich. (S. C.) 321. The attempt has been made to extend the admissibility of dying declarations to civil cases. McFarland *v.* Shaw, 2 Law Repos. (N. C.) 102; Malaun's Admr. *v.* Ammon, 1 Grant (Pa.), 123. But see Wooten *v.* Wilkins, 39 Ga. 223; Marshall *v.* Chic. &c. R. R. Co., 48 Ill. 475; Waldele *v.* N. Y. Central, &c. R. R. Co., 19 Hun, 69; R. R. *v.* Maloy, 77 Ga. 237; Daily *v.* N. Y. &c. R. R. Co., 32 Conn. 356, *contra*. See also Ins. Co. *v.* Mosley, 8 Wall. 397. The declarations are equally admissible for or against the accused. State *v.* Saunders, 14 Oreg. 300; Mattax *v.* U. S., 146 U. S. 140. But it has been held that the declaration of a third party on his death-bed that he murdered deceased is not admissible for accused. West *v.* State, 76 Ala. 98. They may be in writing. State *v.* Kindle, 47 Oh. St. 358; King *v.* State, 91 Tenn. 617; Drake *v.* State, 25 Tex. App. 293. May be given in reply to questions not leading. Hunnicut *v.* State, 18 Tex. App. 498; Anderson *v.* State, 79 Ala. 5. Or in a hypothetical form. R. *v.* Sparham, 25 C. P. U. C. 143. Lack of religious belief does not exclude such statements. Hill *v.* State, 64 Miss. 431. But the declarations must state facts rather than opinions. Com. *v.* Matthews, 89 Ky. 287; Jones *v.* State, 52 Ark. 345; Boyle *v.* State, 97 Ind. 322.

(*e*) *Minor Considerations.* — The admission of dying declarations does not infringe the prisoner's constitutional right (Const. U. S., Amend. VI.) to be confronted with the witnesses against him. Miller *v.* State, 25 Wis. 384; People *v.* Glenn, 10 Cal. 32; State *v.* Nash, 7 Ia. 347; Brown *v.* Com., 73 Pa. St. 321, 327, 328; Walston *v.* Com., 16 B. Monr. (Ky.) 15; Com. *v.* Casey, 12 Cush. 246; Campbell *v.* State, 11 Ga. 353; Robbins *v.* State, 8 Oh. St. 131, 163. The declarant may be impeached or discredited in any way that a witness may be impeached, *mutatis mutandis*. (Conf. § 256, n. 1 (*b*), (3), *supra*; § 644, n. 1, A. (*b*), (1), *infra*.) Com. *v.* Cooper, 5 All. 495; Morelock *v.* State, 90 Tenn. 528; Nesbit *v.* State, 43 Ga. 238; Goodall *v.* State, 1 Oreg. 333; Walker *v.* State, 37 Tex. 366, 386; M'Pherson *v.* State, 9 Yerg. 279; State *v.* Elliott, 45 Ia. 486. But see Wroe *v.* State, 20 Oh. St. 460, 472, *contra*. See also, to the effect that such dying declarations may be corroborated by proof of prior consistent statements, though the latter are not admissible themselves as dying declarations, State *v.* Blackburn, 80 N. C. 474. (Conf. § 644, n. 1, C. (*a*), *infra*.) The declarant must have been competent to testify to the declaration if alive. 1 Greenl. Ev. § 159; State *v.* Williams, 67 N. C. 12; Wroe *v.* State, 20 Oh. St. 460; Whitley *v.* State, 38 Ga. 50, 70; Binns *v.* State, 46 Ind. 311; Ben *v.* State, 37 Ala. 103. Conf. Goodall *v.* State, 1 Oreg. 333. But the dying declarations of husband or wife are admissible against each other. People *v.* Green, 1 Den. 614; Moore *v.* State, 12 Ala. 764; State *v.* Belcher, 13 S. C. 459. It is immaterial that the declaration is made in

answer to questions which are objectionable as leading. Vass *v.* Com., 3 Leigh, 786; R. *v.* Smith, 23 C. P. U. C. 312.

Only the substance of the declaration need be given, *provided* the declaration is complete in itself. Montgomery *v.* State, 11 Ohio, 424; Ward *v.* State, 8 Blackf. 101; McLean *v.* State, 16 Ala. 672; Murphy *v.* People, 37 Ill. 447; State *v.* Patterson, 45 Vt. 308; Vass *v.* Com., 3 Leigh, 786; State *v.* Nettlebush, 20 Ia. 257. A witness to a dying declaration cannot be impeached by showing deceased's opinion of him. Maryland *v.* Baldwin, 112 U. S. 490.

CHAPTER V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF OTHER PERSONS.

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§ 506. "Res inter alios acta alteri nocere non debet" (*a*). "Res inter alios actæ alteri nocere non debent" (*b*). No person is to be affected by the words or acts of others, unless he is connected with them either personally, or by those whom he represents, or by whom he is represented.[1] To the above forms of the maxim, some books add, "sed quandoque prodesse potest" (*c*), or "sed prodesse possunt" (*d*); and in some it runs, "nec nocere nec prodesse possunt" (*e*). These additions are, however, unnecessary; for the rule is only of general, not universal application, there being several exceptions both ways. Neither does the expression "inter alios" mean that the act must be the act of more than one person, — it being also a maxim of law, "factum unius alteri nocere non debet" (*f*). And the Roman law, from which both maxims were probably taken, expressly says, "Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit" (*g*). Nor does it make any difference that the act was done or confirmed by oath, — "jusjurandum inter alios factum nec nocere, nec prodesse debet" (*h*); consequently the sworn evidence of a witness in one cause or proceeding cannot be

(*a*) Co. Litt. 152 b, 319 a; 2 Inst. 513; 6 Co. 51 b; Broom's Max. 908, 6th Ed. This rule was well known at Rome. "Inter alios res gestas aliis non posse præjudicium facere, sæpe constitutum est." Cod. lib. 7, tit. 60, l. 1. "Inter alios factam transactionem, absenti non posse facere præjudicium, notissimi juris est." *Id.* l. 2. See also Dig. lib. 2, tit. 14, l. 27, § 4. So in the canon law, "Res inter alios acta aliis præjudicium regulariter non adfert." Lancel. Inst. Jur. Can. lib. 3, tit. 15, § 10.

(*b*) 12 Co. 126.

(*c*) Wingate's Max. 327.

(*d*) 6 Co. 1 b.

(*e*) 4 Inst. 279. See also Bonnier, Traité des Preuves, § 692; and Cod. lib. 7, tit. 56, l. 2.

(*f*) Co. Litt. 152 b.

(*g*) Cod. lib. 4, tit. 19, l. 7; 1 Ev. Poth. § 724.

(*h*) 4 Inst. 279. See Dig. lib. 12, tit. 2, l. 3, § 3, and l. 9, § 7, and l. 10.

[1] The American rule as to *res inter alios acta* is stated *infra*, p. 463.

made available in another cause or proceeding between other parties. One important branch of this rule, "res inter alios *judicata* alteri nocere non debet," will be more properly considered under the head of res judicata (*i*). When the person whose words or acts are offered in evidence is also the opposite party to the suit, the evidence is further inadmissible by virtue of another important principle, — that no man shall be allowed to make evidence for himself (*j*); which also is in accordance with the Roman law, where it is laid down, "Factum cuique suum, non adversario nocere debet" (*k*).

§ 507. From the great principle which exacts the best evidence, it is obvious that things done *inter alios* or *ab alio* are even more objectionable than derivative or second-hand evidence. The two are, indeed, sometimes confounded; but there is this distinction between them, — that derivative or second-hand evidence indicates *directly* a source of legitimate evidence, while res inter alios acta either indicates no such source, or at most does so only indirectly. Suppose, for instance, that on an indictment for larceny, A. were to depose that he heard B. (a person not present) say that he saw the accused take and carry away the property; this evidence is objectionable as being offered *obstetricante manu*, but it indicates a better source, — namely, B. Suppose, however, that C. were to depose that he overheard two persons unknown forming a plan to commit the theft in question, in which they spoke of the accused as an accomplice who would assist them in its execution; this evidence is but res inter alios acta, for it shows no better source of legal proof; although as indicative evidence, and thus putting officers of justice, &c., on a track, it certainly might not be without its use.

§ 508. There is likewise this point of resemblance between second-hand evidence and res inter alios acta, that the latter, like the former, must not be understood as excluding proof of res gestæ. The true meaning of the rule under consideration is simply this, that a party is not to be affected by what is done behind his back. Thus, if the question between plaintiff and defendant were whether the former had paid a sum of money to D., a receipt by D., acknowledging payment to him by the plaintiff of the money in question, would not, *per se*, be evidence of such payment as against the defendant, it being res inter alios acta; and yet it would be admissible, as part of the res gestæ, for the purpose of proving such payment (*l*). So when the matter in issue consists of an act which is separable from the person

(*i*) *Infrà*, ch. 9.
(*j*) See *infrà*, ch. 7.
(*k*) Dig. lib. 50, tit. 17, l. 155.
(*l*) *Carmarthen & Cardigan Railway Co.* v. *Manchester & Milford Railway Co.*, L. Rep., 8 C. P. 685.

of the accused, who is nevertheless accountable for it, proof may be given of that act before he is connected with it by evidence. This may be illustrated as follows. Offences, as has been shown in a former place (*m*), are rightly divisible into *delicta facti permanentis* and *delicta facti transeuntis; i. e.*, into offences which leave traces or marks, — such as homicide, arson, burglary, &c., — and offences which do not, such as conspiracy, criminal language, and the like. With respect to the former, it is every day's practice to give proof of a corpus delicti — that a murder, an arson, a burglary, &c., was committed — before any evidence is adduced affecting the accused, although without such evidence the antecedent proof of course goes for nothing. And the same holds when the offence is *facti transeuntis*. Thus, on an indictment for libel, proof may first be given of the libel, and the defendant may then be shown to have been the publisher of it. Another illustration is afforded by prosecutions for conspiracy, where it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it (*n*); for here the corpus delicti is the conspiracy, and the participation of the accused is an independent matter which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows rests partly on this principle, and partly on the law of principal and agent.

§ 509. The rule, "res inter alios acta alteri nocere non debet," is so elementary in its nature that a few instances will suffice for its illustration (*q*). Sir Edward Coke gives the following: "If a man make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornment in law. Et res inter alios acta, &c." (*r*). Where several persons are accused or suspected of a criminal offence (*s*), or sued in a civil court (*t*), a confession or admission by one in the absence of his fellows is no evidence against them. So where, on an appeal of robbery against A., the jury acquitted the defendant, and found that B. and C. abetted the appellant to bring the false appeal, as B. and C. were strangers to the original, they were not concluded by this finding; "but," adds

(*m*) *Supra*, ch. 2, sect. 3, sub-sect. 2.

(*n*) See *R.* v. *Blake*, 6 Q. B. 126; *R.* v. *Esdaile*, 1 Fost. & F. 213.

(*q*) The reader desirous of more will find a large number collected in Wingate's Maxims, p. 327.

(*r*) Co. Litt. 319 a.

(*s*) Kely. 18; 9 How. St. Tr. 23.

(*t*) Godb. 326, pl. 418; *Hemmings* v. *Robinson*, 1 Barnes' Notes, 317.

the report, "they shall be distrained ad respondendum" (*u*), — a good instance of the value of res inter alios acta as *indicative*, however dangerous it would be as *legal*, evidence.

§ 510. We have said that there are exceptions to this rule. Thus, although in general strangers are not bound by, and cannot take advantage of estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person (*x*). So a judgment *in rem*, in the Exchequer, is conclusive against all the world (*y*); as also was a fine after the period of non-claim had elapsed (*z*). The admissibility in evidence of many documents of a public and quasi-public nature is at variance with this principle, which is then brought in collision with the maxim, "Omnia præsumuntur ritè esse acta;" and the number of them has been much increased by statute, especially in late years (*a*). The following decided exception is also given by Littleton (*b*): "If there be lord, mesne, and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of twelve pence, if the lord paramount purchase the tenancy in fee, then the service of the mesnalty is extinct; because that when the lord paramount hath the tenancy, he holdeth of his lord next paramount to him, and if he should hold this of him which was mesne, then he should hold the same tenancy immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seigniory of the mesnalty is extinct." On this Sir Edward Coke observes (*c*): "It is holden for an inconvenience that any of the maxims of the law should be broken, though a private man suffer loss; for that by infringing of a maxim, not only a general prejudice to many, but in the end a public incertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet;* which are true with this exception, unless an inconvenience should follow." And another old book lays down as maxims, "Privatum incommodum public bono pensatur" (*d*); "Privatum commodum publico cedit" (*e*).

(*u*) Old record of Mich. 42 Edw. III. set out 12 Co. 125, 126.
(*x*) *Infrà*, ch. 7, sect. 2.
(*y*) *Infrà*, ch. 9.
(*z*) 2 Blackst. Comm. 354.
(*a*) See bk. 1, pt. 2.
(*b*) Sect. 231.
(*c*) Co. Litt. 152 b.
(*d*) Jenk. Cent. 2, Cas. 65.
(*e*) Jenk. Cent. 5, Cas. 80.

AMERICAN NOTES.

(§ 506) Res inter Alios Acta. — (*a*) *Rule.* — The question being whether A. did or omitted to do a certain act, no evidence is admissible of other similar acts or omissions which, by their general resemblance thereto, suggest a probable inference that A. did or omitted to do the act in question, unless the two transactions are connected in some particular manner. Steph. Dig. Law Ev., arts. 10–12; 1 Greenl. Ev. § 52; 1 Whar. Ev. § 29; Mailler *v.* Exp. Propeller Line, 61 N. Y. 312, 316; Cole *v.* Com., 5 Gratt. 696; State *v.* Shuford, 69 N. C. 486; Shaser *v.* State, 36 Wis. 429; Maguire *v.* Middlesex R. R. Co., 115 Mass. 239; Eskridge *v.* R. R., 89 Ky. 367; Cohen *v.* Cohen, 2 Mackie, 227; State *v.* Parker, 96 Mo. 382; State *v.* Alston, 94 N. C. 930; Franklin *v.* Franklin, 90 Tenn. 44; Tuttle *v.* R. R., 152 Mass. 42; Aiken *v.* Kennison, 58 Vt. 665; Newhall *v.* Appleton, 102 N. Y. 133; Benedict *v.* Rose, 24 S. C. 297; Harris *v.* Howard, 56 Vt. 695; Boyd *v.* U. S., 142 U. S. 450, Costelo *v.* Crowell, 139 Mass. 588. Where two occurrences make one transaction, the rule does not apply. Prior *v.* State, 77 Ala. 56. It is immaterial that in proving one crime another is incidentally proved. Com. *v.* Johnson, 150 Mass. 54.

(*b*) *Exceptions.* — Such acts or omissions are admissible, — (1) To show the existence of knowledge, intent, motive, or any bodily or mental state whatever, in any case where the existence of such knowledge, intent, or state is a fact in issue, or a fact relevant thereto. Ross *v.* State, 62 Ala. 224; Street *v.* State, 7 Tex. Ct. App. 5, 9; Bottomley *v.* U. S., 1 Story, 135, 143; Castle *v.* Bullard, 23 How. 172, 186; Butler *v.* Watkins, 13 Wall, 456, 464; Friend *v.* Hamill, 34 Md. 298, 306; Com. *v.* Ferrigan, 44 Pa. St. 386; French *v.* White, 5 Duer (N. Y.), 254; Com. *v.* Coe, 115 Mass. 481; People *v.* Marion, 29 Mich. 31, Hawes *v.* State, 88 Ala. 37; Com. *v.* Robinson, 146 Mass. 571; Hicks *v.* State, 86 Ala. 30; O'Brien *v.* Com., 89 Ky. 354; Smith *v.* Benefit Soc'y, 123 N. Y. 85; People *v.* O'Sullivan, 104 N. Y. 481; R. R. *v.* Rowland, 82 Tex. 166; Funderburg *v.* State, 23 Tex. App. 392; Grace *v.* McArthur, 76 Wis. 641; Miller *v.* State, 68 Miss. 221; R. *v.* Chasson, 16 New Bruns. 546; Curtis *v.* State, 78 Ala. 12. So malice may be shown by a wide range of evidence of this nature. State *v.* Palmer, 65 N. H. 216; Burnett *v* State, 14 Lea, 439; Woolfolk *v.* State, 85 Ga. 69, 104; Lunsford *v.* Dietrich, 93 Ala. 565; Eldridge *v.* State, 27 Fla. 162; Garrett *v.* State, 76 Ala. 18; Hamel *v.* Amyt, 14 Queb. 56. Conf. People *v.* Corbin, 56 N. Y. 363; Coleman *v.* People, 58 N. Y. 555. But see State *v.* Lapage, 57 N. H. 245, *contra.* (2) To show an organized plan or system of operations. Phillips *v.* People, 57 Barb. 353; Com. *v.* Choate, 105 Mass. 451; Pierce *v.* Hoffman, 24 Vt. 525; Jordan *v.* Osgood, 109 Mass. 457; Moline Co. *v.* Franklin, 37 Minn. 137; State *v.* Tabor, 95 Mo. 585; People *v.* Wright, 89 Mich. 70, 82; Tarbox *v.* State, 38 Oh. St. 581; N. Y. Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591. So of a general fraudulent plan. Baldwin *v.* Short, 125 N. Y. 553; Bernheim *v.* Dibrell, 66 Miss. 199; Adams *v.* Kenney, 59 N. H. 133. But see Endaily *v.* State, 39 Ark. 278, Kent. Central R. R. *v.* Barrow, 89 Ky. 638; Alabama R. R. *v.* Sellers, 93 Ala. 9. See also Shaffner *v.* Com., 72 Pa. St. 60. (3) To negative the theory of accident. State *v.* Wentworth, 37 N. H. 196; Higley *v.* Gilmer, 3 Mont. 90, 107; Bersh *v.* State, 13 Ind. 434; Bottomley *v.* U. S., 1 Story, 135, 143; Faucett *v.* Nichols, 64 N. Y. 377, 383; Parkinson *v.* R. R., 61 N. H. 416. (4) To corroborate a witness. Com. *v.* Merriam, 14 Pick. 518. (5) On an indictment for receiving stolen goods knowing them to be stolen, evidence of previous receipt of stolen goods with guilty knowledge is admissible. Copperman *v.* People, 56 N. Y. 591; Shriedley *v.* State, 23 Oh. St. 130, 142; Devoto *v.* Com., 3 Metc. (Ky.) 142. The exception is limited in Coleman *v.* People, 58 N. Y. 555. So of the present or past possession of forged or counterfeit coin or paper, on an indictment for uttering such coin or paper. Com. *v.* Hall, 4 All. 305; People *v.* Farrell, 30 Cal. 316; U. S. *v.* Burns, 5 McLean, 23.

(*c*) *Modern Relaxation of the Rule.* — The rule hinted at rather than stated in the phrase *res inter alios acta* being in its nature exclusionary, it may be assumed that the evidence it was designed to exclude is both logically and legally relevant. (Conf § 251,

n. 1, *supra*.) The grounds of the rule, therefore, are entirely practical; viz., — (1) to prevent multiplicity of collateral issues, confusing to the jury and acting as a surprise upon the parties; (2) to provide that a man shall not be convicted of one crime by evidence that he has committed another. Hubbard *v.* R. R. Co., 39 Me. 506. This being the case, there may be said to exist, in the United States, a strong tendency to limit the rule in civil causes. This relaxation appears most commonly in the numerous cases where the necessary proof of liability consists in strengthening a possible into a probable cause by elimination of all complicating circumstances; in other words, by establishing the desired relation of cause and effect through the inductive process of tracing the same effect through a variety of instances where the cause for which legal liability is claimed is the only constant force; *e. g.*: —

It being in dispute whether a horse was or was not frightened by a certain pile of lumber, evidence that other horses were frightened by the same pile, under a variety of circumstances, is admissible. Darling *v.* Westmoreland, 52 N. H. 401. So of a steam-whistle. Crocker *v.* McGregor, 76 Me. 282.

The question being whether a certain railroad company negligently permitted its cars to run off the track, evidence is admissible that the company's cars have frequently run off the same track. Mobile, &c. R. R. Co. *v.* Ashcroft, 48 Ala. 15.

The question being whether a certain fire was caused by sparks from a certain locomotive, evidence is admissible that both before and after such fire, at various times during the same summer, other fires have been caused or rendered possible by sparks from other engines belonging to the same company. Koontz *v.* R. R., 20 Oreg. 3; Robinson *v.* R. R., 23 New Bruns. 323; Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454; Penn. R. R. Co. *v.* Stranahan, 79 Pa. St. 405; Field *v.* N. Y. Cen. R. R. Co., 32 N. Y. 339; Longabaugh *v.* Virginia City, &c. R. R. Co., 9 Nev. 271; Boyce *v.* Cheshire R. R. Co., 43 N. H. 627; Cleveland *v.* Grand Trunk R. R. Co., 42 Vt. 449; Annapolis, &c. R. R. Co. *v.* Gantt, 39 Md. 115. Conf. Smith *v.* O. C. R. R., 10 R. I. 22; Edwards *v.* Ottawa Navig. Co., 39 Q. B. U. C. 264; Jacksonville R. R. *v.* Peninsular Co., 27 Fla. 1; Diamond *v.* R. R., 6 Mont. 580; Haseltine *v.* R. R., 64 N. H. 545; Collins *v.* R. R., 109 N. Y. 243; Stertz *v.* Stewart, 74 Wis. 160. But see *contra*, Coale *v.* Hannibal, &c. R. R. Co., 60 Mo. 227; Baltimore, &c. R. R. Co. *v.* Woodruff, 4 Md. 242, 254; Boyce *v.* Cheshire R. R., 42 N. H. 97. The last two cases may, however, be considered as substantially overruled. 2 Central L. J. 642.

(*d*) *Admissions.* — The rule of *res inter alios acta* has no application to admissions (conf. § 519, n. 1, *infra*) by a party, or those identified with him in legal interest.

CHAPTER VI.

OPINION EVIDENCE.

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§ 511. THE use of witnesses being to inform the tribunal respecting *facts*, their *opinions* are not in general receivable as evidence (*a*).[1] This rule is necessary to prevent the other rules of evidence being practically nullified. Vain would it be for the law to constitute the jury the triers of disputed facts, to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury, whom the law presumes to be at least as capable as the witnesses of drawing from them any inferences that justice may require: "Testes rationem scientiæ reddere teneantur" (*b*); "Les testm̃ doivent rien tesm̃ fors ceo que ils soient de certein, s. ceo que ils veront ou oyront" (*c*); "Omne sacramentum debet esse certæ scientiæ" (*d*). "It is no satisfaction for a witness to say that *he thinks* or *persuadeth himself*, and this for two reasons. First, Because the judge is to give an absolute sentence, and for this ought to have a more sure ground than thinking Secondly, The witness cannot be sued for perjury" (*e*).

§ 512. This rule must not, however, be misunderstood, — nothing being farther from the design of the law than to exclude from the

(*a*) Peake, Ev. 195, 5th Ed.; Ph. & Am. Ev. 899; 1 Phill. Ev. 520, 10th Ed.; 1 Greenl. Ev. § 440, 7th Ed.; 3 Burr. 1918; 5 B. & Ad. 846, 847; and the authorities in the following notes.

(*b*) Heinec. ad Pand. pars 4, § 144.

(*c*) Per Thorpe, C. J., 23 Ass. pl. 11.

(*d*) 4 Inst. 279.

(*e*) Dyer, 53 b. pl. 11. in marg. Ed. 1688.

[1] For the American cases, see *infra*, p. 473.

cognisance of the jury anything which could legitimately assist them in forming a judgment on the facts in dispute. The meaning of the rule is simply that questions shall not be put to a witness which, by substituting his judgment for theirs, virtually put him in the place of the jury. A good illustration of its real nature is afforded by the case of *Daines and another* v. *Hartley* (*f*). That was an action for slandering the plaintiffs in their trade. At the trial a witness deposed to the following words, as having been spoken by the defendant relative to some bills given by the plaintiffs to a firm of which the witness was member: "You must look out sharp that those bills are met by them." The counsel for the plaintiffs then proposed to ask, "What did you understand by that?" which question was objected to, and disallowed by the judge. A rule for a new trial was afterwards obtained on the ground that the question was improperly rejected; which, after argument, was discharged; and the following judgment was delivered by Pollock, C. B., in the name of the court: "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered, is uttered in an ironical sense, and therefore that it may mean directly the reverse of what it professes to mean. Something may have previously passed, which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel, who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not 'What did you understand by those words?' but 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning I believe we may say that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a founda-

(*f*) 3 Exch. 200.

tion may be laid, by showing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question."

§ 513. The rule is not without its exceptions. Being based on the presumption that the tribunal is as capable of forming a judgment on the facts as the witness, when circumstances rebut this presumption, the rule naturally gives way, — "Cessante ratione legis, cessat ipsa lex" (*g*). 1. On questions of science, skill, trade, and the like, persons conversant with the subject-matter — called by foreign jurists "experts," an expression now naturalised among us — are permitted to give their opinions in evidence. This rests on the maxim, "Cuilibet in suâ arte perito est credendum" (*h*); and the principle has been thus stated by Mr. Smith, in commenting on *Carter* v. *Boehm*, in which case the opinion of an insurance broker as to materiality of facts not communicated was held to be inadmissible as evidence (*i*); viz., that "the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." A large number of instances of the application of this principle are to be found in the books (*k*). The opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequence of wounds, or with respect to the sane or insane state of a person's mind, as collected from a number of circumstances, and on other subjects of professional skill (*l*). Seal engravers may be called to give their opinion upon an impression,

(*g*) Co. Litt. 70 b.

(*h*) Co. Litt. 125 a; 4 Co. 29 a; Broom's Maxims, 6th Ed. 825.

(*i*) 1 Smith's Lead. Cas. notes to *Carter* v. *Boehm*, citing *Folkes* v. *Chadd*, 3 Doug. 157, and other cases. And see per Lord Ellenborough, *Beckwith* v. *Sydebotham*, 1 Camp. 116, 117, and note (*a*) to *Fenwick* v. *Bell*, 1 C. & K. 313.

(*k*) See a large number of American cases collected, p. 473.

(*l*) 1 Greenl. Ev. § 440, 7th Ed. The practice of resorting to this species of scientific evidence is by no means a modern invention. In the 28 Ass. pl. 5, on an appeal of mayhem, the defendant prayed that the court would see the wound, to see if there had been a maiming or not. And the court did not know how to adjudge, because the wound was new, and then the defendant took issue, and prayed the court that the mayhem might be examined; on which a writ was sent to the sheriff, to cause to come "Medicos, chirurgicos de melioribus Londinii ad informandum dominum regem et curiam de his, quæ eis ex parte domini regis injungerentur." See also Plowd. 125.

whether it was made from an original seal or from an impression; the opinion of an artist is evidence in an inquiry as to the genuineness of a picture; a ship-builder, after having heard the evidence of persons who have examined a ship, may give his opinion as to whether she was seaworthy; and where the question was whether a bank which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers as to the effect of such an embankment upon the harbour were held admissible evidence (*n*). To these it may be added, that the opinions of antiquaries have been received relative to the date of ancient handwriting (*o*); and that the opinions of "experts in handwriting" have been received to prove that a particular letter was or was not written by a particular person (*o'*). Where, on an indictment for uttering a forged instrument, the question was whether a paper had originally contained certain pencil-marks, which were alleged to have been rubbed out and writing substituted in their stead, the opinion of an engraver — who was in the habit of looking at minute lines on paper, and who had examined the document with a mirror — as to such marks having existed, was held to be admissible, but with the reservation that the weight of the evidence would depend on the extent to which it might be confirmed (*p*). It is on this principle that the evidence of professional or official persons is receivable as proof of their own (*q*) foreign laws (*r*). From the very nature of the subject, experts can only speak to their judgment or belief.

§ 514. But the weight due to this, as well as to every other kind of evidence, is to be determined by the tribunal; which should form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable. Nor is this always an easy task, — there being no evidence the value of which varies so immensely as that now under consideration, and respecting which it is so difficult to lay down any rules beforehand. Its most legitimate, valuable, and wonderful application is on charges of poisoning, where poison is extracted from a corpse by means of chemical analysis (*s*). "It is surely," says Dr. Beck (*t*), "no mean effort of human skill to be brought to a dead body, — disinterred perhaps

(*n*) 1 Greenl. Ev. § 440, 7th Ed.

(*o*) *Tracy Peerage case*, 10 Cl. & F. 154.

(*o'*) See *Seaman* v. *Netherclift*, 2 C. P. D. 53, as to the privilege of such an expert.

(*p*) Per Parke, B., and Tindal, C. J., *R.* v. *Williams*, 8 C. & P. 434, 435.

(*q*) *Bonetti, In the goods of*, 1 P. D. 69.

(*r*) Tayl. Ev. § 1280, 4th Ed.; *The Sussex Peerage case*, 11 Cl. & F. 85; *Earl Nelson* v. *Lord Bridport*, 8 Beav. 527; *The Baron de Bode's case*, 8 Q. B. 208; *Bristow* v. *Sequeville*, 5 Exch. 275; *Vander Donckt* v. *Thellusson*, 8 C. B. 812; *Perth Peerage case*, 2 Ho. Lo. Cas. 874.

(*s*) *Supra*, ch. 2, sect. 3, sub-sect. 2.

(*t*) Beck's Med Jurisp. 1085, 7th Ed.

after it has lain for months, or even years in the grave, — to examine its morbid condition; to analyse the fluids contained in it (often in the smallest possible quantities); and from a course of deductions founded in the strictest logic, to pronounce an opinion which combined circumstances, or the confession of the criminal, prove to be correct." "It is such duties ably performed that raise our profession to an exalted rank in the eyes of the world; that cause the vulgar, who are ever ready to exclaim against the inutility of medicine, to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta, can still be detected. It does more: it impresses on the minds of assassins who resort to poison a salutary dread of the great impossibility of escaping discovery." "And this, if properly done, must be accomplished without listening to rumour, and without permitting prejudice to operate. Many, again, by their researches, have saved the innocent, showing that accidental or natural causes have produced all the phenomena." It would not be easy to overrate the value of the evidence given in many difficult and delicate inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But as it is impossible to measure à priori the integrity of any witness, and equally so to determine the amount of skill which a person following a particular science, art, or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses. Now, after making every allowance for the natural bias which witnesses usually feel in favour of causes in which they are engaged, and giving a wide latitude for bonâ fide opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture, — there can be no doubt that testimony is daily received in our courts as "scientific evidence" to which it is almost profanation to apply the term; as being revolting to common-sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury, — an offence of which it is extremely difficult, indeed, almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters (*u*). On the other hand, however, mistakes have occasionally arisen from not attaching sufficient weight to scientific

(*u*) Bonnier, in his Traité des Preuves, after quoting the 64th Novel, which abundantly shows that these malpractices were well understood in ancient Rome, sarcastically adds, "On voit que les complaisances de l'expertise ne datent pas de nos jours." § 68. He likewise forcibly observes, § 67: "L'expertise n'est qu'un verre qui grossit les objets; et c'est au juge, qui a la faculté de s'en servir, à examiner en toute liberté si les images qu'elle lui présente sont bien nettes."

testimony. This arises chiefly where the knowledge of the tribunal and society in general are very much in arrear of the scientific knowledge of the witness. One remarkable instance is cited by a modern author on the law of evidence. In the infancy of travelling by steam on land, a civil engineer of high reputation having deposed before a Parliamentary committee that steam-carriages might very possibly be expected to travel on railroads at the rate of *ten* miles an hour, the interrogating counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of the evidence he had previously given was much impaired (*x*).

§ 515. In France experts are officially delegated by the court to inquire into facts and report upon them; and they stand on a much higher footing than either ordinary or scientific witnesses among us. Yet even there it is a maxim, "Dictum expertorum nunquam transit in rem judicatam" (*y*). But our law, in its desire to vindicate the unquestionably sound principle that judicial and inquisitorial functions ought to be kept distinct, appears not to have armed the courts with sufficient powers to compel the production of evidence. For although the power of the courts to procure the evidence of experts has been greatly enlarged by recent enactments, still it would seem that those enactments do not authorise the exercise of that power *ex officio*, but only on the application of a party to the action (*a*).

§ 516. So far as medical evidence is concerned, medical jurists complain that there is too little discrimination exercised, in receiving all who are called *doctors* as witnesses. "In England," says an able authority already quoted (*b*), "not only physicians, surgeons, and apothecaries, beyond whom it should not be extended, but hospital dressers, students, and quacks have been permitted to act as medical witnesses. 'We could point out a case of poisoning,' say the editors of the Edinburgh Medical and Surgical Journal, 'where the most essential part of the evidence depended on the testimony of a quack alone, and it was admitted.'" But, to answer these authors in their own language, the remedy they prescribe is worse than the disease. Must the judge, before receiving the testimony of a man who makes

(*x*) Gresl. Ev. in Eq. 369. Stephenson's evidence, before the committee on the Liverpool and Manchester Railway Bill, was received with equal incredulity. See Smile's Life of Stephenson, *in loc.*

(*y*) Bonnier, Traité des Preuves, § 74.

(*a*) Power to proceed *ex officio*, in certain cases, has been given to the courts by the 22 & 23 Vict. c. 63, and 24 Vict. c. 11; by the former of which, the courts in one part of the Queen's dominions are empowered to remit a case for the opinion of a court of justice in any other part thereof, on any point on which the law of that other part is different from that in which the court is situate; and by the latter, to remit a case, with queries, to the tribunals of foreign countries, for the purpose of ascertaining the law of those countries.

(*b*) Beck's Med. Jurisp. 1091, 7th Ed.

profession of the healing art, institute a preliminary inquiry as to whether he comes within the definition of a "quack"? — one of the most uncertain words in the language, and the correctness of the application of which to particular individuals must ever, to a certain extent, be matter of opinion. Besides, it would be at variance with the free spirit of our laws to place the lives and liberties of all persons accused of offences, in the hands of a privileged class, by prohibiting them from availing themselves of the testimony of others who have studied and practised the subject in question. Still it must be conceded that our practice is much too loose in this respect; that when medical, or other scientific witnesses are offered, our judges and jurymen do not inquire sufficiently into the causa scientiæ, — the means which they have had of forming a judgment. To say nothing of those palpable cases where the course of study has been so short, or the experience so limited, that the judge ought to reject the witness altogether; or of those where, though the evidence must be received, it is clear that little confidence ought to be reposed in the opinion given, — it often happens that even men distinguished in one branch of a science or profession have but a superficial knowledge of its other branches. The most able physician or surgeon may know comparatively little of the mode of detecting poisons, or of other intricate branches of medical jurisprudence; so that a chemist or physiologist, immeasurably his inferior in every other respect, might prove a much more valuable witness in a case where that sort of knowledge is required (*c*).

§ 517. 2. Another class of exceptions is to be found, where the judgment or opinion of a witness on some question material to be considered by the tribunal, is formed on complex facts which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. "In the identification of person," says Parke, B. (*d*), "you compare in your mind the man you have seen with the man you see at the trial. The same rule belongs to every species of identification." And on the same occasion, Alderson, B., said, "Generally, wherever there is such a coincidence in admitted facts as makes it more reasonable to conclude that a certain subject-matter is one thing rather than another, that coincidence may be laid before the jury, to guide their judgment in deciding on the probability of

(*c*) The celebrated John Hunter, the great anatomist, who was examined as a witness in the important case of *Donellan*, indicted for having poisoned his brother-in-law, used to express his regret publicly in his lectures, that he had not given more attention to the subject of poisons, before venturing to give an opinion in a court of justice. Sir Astley Cooper, as quoted in Beck's Med. Jurisp. 1089, 7th Ed.

(*d*) *Fryer* v. *Gathercole*, 13 Jur. 542.

that fact." Many mistakes, however, have been made in the identification both of persons and of things. The resemblance between individuals is often very close. A well-known man of fashion once narrowly escaped conviction for a highway robbery, from his extraordinary resemblance to a notorious highwayman of the day (Beck's Med. Jurisp. 408, 7th Ed.); and Sir Thomas Davenport, an eminent barrister, swore positively to the persons of two men, whom he charged with robbing him and his lady in the open daylight. A clear alibi was, however, proved, and the real robbers being afterwards taken into custody, with the stolen property upon them, Sir Thomas, on seeing them, at once acknowledged that he had been mistaken (*e*). So the state of an unproducible portion of real evidence — as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository — may be explained by a term expressing a complex idea; *e. g.*, that it looked old, decayed, or fresh, was in good or bad condition (*f*), &c. So also may the emotions or feelings of a party whose psychological condition is in question, — thus a witness may state whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like (*g*). To this head also belongs the proof of handwriting ex visu scriptionis and ex scriptis olim visis (*h*). And it is on this principle that testimony to character is received; as where a witness deposes to the good or bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath (*i*). In all cases, of course, the grounds on which the judgment of the witness is formed may be inquired into on cross-examination.

(*e*) (See per MacNally, *arguendo*, in *R.* v. *Byrne*, 28 How. St. Tr. 819.) For other cases of mistaken identity of *persons*, see Wills, Circ. Evid. 90 *et seq.* 3rd Ed.; Beck's Med. Jurisp. 404 *et seq.* 7th Ed.; the case of *James Crow*, Theor. of Pres. Proof, Append. Case 4, and that of *Male*, 3 Benth. Jud. Ev. 255; Dicks. Law Ev. in Scotl. 153, n. (*d*), and 154, n. (*a*); and the charge of Cockburn, C. J., in *Reg.* v. *Castro*, otherwise *Orton*, otherwise *Sir Roger Tichborne*, published in 2 vols. in 1875. In *Shufflebottom* v. *Allday*, Exch. M. 1856, MS., Alderson, B., mentioned a case which occurred at Liverpool some years before, where a prisoner was identified by six or seven respectable witnesses; but their evidence was encountered by that of the jailor and all the officers of the prison, who deposed that at the time in question he was there in their custody. A good instance of mistaken identity of *things*, taken from Burnett's Crim. Law of Scotland, p. 558, will be found in 19 How. St. Tr. 494 (n.).

(*f*) *Leighton* v. *Leighton*, 1 Str. 240.

(*g*) *Suprà*, ch. 2, sect. 3, sub-sect. 3.

(*h*) Bk. 2, pt. 3, ch. 2.

(*i*) *Suprà*, pt. 1, ch. 1.

AMERICAN NOTES.

(§ 511) Opinion Evidence. — (*a*) *Rule.* — The opinion of a witness is not in general to be received. Facts should be stated, and not inferences. 5 Am. L. R. 227; Barts *v.* Morse, 126 Mass. 226; Page *v.* Parker, 40 N. H. 47, 59; Hames *v.* Brownlee, 63 Ala. 277; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Cook *v.* Fuson, 66 Ind. 521; Parsons *v.* Lindsay, 26 Kans. 426; People *v.* Greenfield, 23 Hun, 454, 462, 463; R. R. Co. *v.* Smith, 52 Tex. 178; Weeks *v.* Lyndon, 54 Vt. 638, 645; Veerhusen *v.* Chic. &c. R. R., 53 Wis. 689, 694; Hart *v.* R. R., 94 Mo. 255; State *v.* Starnes, 94 N. C. 973; Garner *v.* State, 28 Tex. App. 561; Evans *v.* Dickey, 117 Ill. 291; Hoadley *v.* Hammond, 63 Ia. 599; People *v.* Sharp, 107 N. Y. 427. But a witness can state what he understood. Fiske *v.* Gowing, 61 N. H. 431.

"*Matter of Opinion.*" — Accurately to distinguish "matter of fact" from "matter of opinion" is not less difficult than to distinguish it from "matter of law." (Conf. § 11, n. 1; § 82, n. 2, *supra.*) In all supposed statement of fact the witness really testifies to the opinion formed by the judgment upon the presentment of the senses. Statement of opinion is therefore necessarily involved in statement of fact. 1 Whar. Ev. § 15. An instance, erroneously supposed to be simply an "opinion," is found in cases where the phenomena being too numerous or intangible to permit of correct or effective individual statement, witnesses are permitted to state simply the impression such phenomena produced in their minds. This, apparently, is simply another method of stating facts. Com. *v.* Sturtivant, 117 Mass. 122, 133; Cavendish *v.* Troy, 41 Vt. 99; Parsons *v.* Lindsay, 26 Kans. 426; Walker *v.* State, 63 Ala. 393; Schlencker *v.* State, 9 Brown (Neb.), 241; Sydleman *v.* Beckwith, 43 Conn. 9, 11; Graham *v.* Penn. Co., 139 Pa. St. 149; Jones *v.* Fuller, 19 S. C. 66; Powers *v.* State, 23 Tex. App. 42. But such a witness may be required also to state the facts observed by him. Reynolds, Ev., § 51.

Thus, a witness can testify as to whether a person appeared to be in love. M'Kee *v.* Nelson, 4 Cowen, 355. Or insane. Ins. Co. *v.* Rodel, 95 U. S. 232, 239; Hardy *v.* Merrill, 56 N. H. 227; State *v.* Potts, 100 N. C. 457; Territory *v.* Roberts, 9 Mont. 12; Carpenter *v.* Hatch, 64 N. H. 573; Dewitt *v.* Barly, 17 N. Y. 340; Dunham's Appeal, 27 Conn. 193, 198; Hathaway's Admr. *v.* Ins. Co., 48 Vt. 335; Pidcock *v.* Potter, 68 Pa. St. 342; Upstone *v.* People, 109 Ill. 169; McConnell *v.* Wildes, 153 Mass. 487; State *v.* Williamson, 106 Mo. 162; State *v.* Lewis, 20 Nev. 333; Wise *v.* Foote, 81 Ky. 10; Scalf *v.* Collin County, 80 Tex. 514; Westmore *v.* Sheffield, 56 Vt. 239; Fishburne *v.* Ferguson, 84 Va. 87; Ins. Co. *v.* Lathrop, 111 U. S. 612; Johnson *v.* Culver, 116 Ind. 278; Paine *v.* Aldrich, 133 N. Y. 544, *contra;* Rutherford *v.* Morris, 77 Ill. 397; Williams *v.* Lee, 47 Md. 321; Butler *v.* Ins. Co., 45 Ia. 93; Garrison *v.* Blanton, 48 Tex. 299; Estate of Brooks, 54 Cal. 471. See also Waters *v.* Waters, 35 Md. 531, 541; Cowles *v.* Merchants, 140 Mass. 377; Pelamourges *v.* Clark, 9 Ia. 1, 12; Com. *v.* Brayman, 136 Mass. 438; Doe *v.* Reagan, 5 Blackf. 217; Wyman *v.* Gould, 47 Me. 159. Or in good health, or the reverse. Parker *v.* Steamboat Co., 109 Mass. 449; R. R. *v.* McLendon, 63 Ala. 266; Sloan *v.* R. R. Co., 45 N. Y. 125. Or seemed hostile, friendly, or the like. Polk *v.* State, 62 Ala. 237; State *v.* Buchler, 103 Mo. 203; State *v.* James, 31 S. C. 218. Or felt sad. Culver *v.* Dwight, 6 Gray, 444. But see McAdory *v.* State, 59 Ala. 92, *contra.* Or appeared intoxicated. People *v.* Eastwood, 14 N. Y. 562; State *v.* Pike, 49 N. H. 399; Pierce *v.* State, 53 Ga. 365; Aurora *v.* Hillman, 90 Ill. 61; Castner *v.* Sliker, 33 N. J. L. 95; People *v.* Monteith, 73 Cal. 7; Cook *v.* Ins. Co., 84 Mich. 12. But see Dillard *v.* State, 58 Miss. 368; State *v.* Huxford, 47 Ia. 16. Can state as to who "controlled" land. Woodstock Iron Co. *v.* Roberts, 87 Ala. 436. Or that a spot was "blood." People *v.* Deacons, 109 N. Y. 374. Or that a person appeared rational. People *v.* Lavelle, 71 Cal. 351; People *v.* Packenham, 115 N. Y. 200. Or in good health. Smalley *v.* Appleton, 70 Wis. 340. Or as to age. Com. *v.* O'Brien, 134 Mass. 198; Elsner *v.* Lodge, 98 Mo. 640. Or looked "excited." State *v.* Houston, 78 Ala. 576. Or "scared." State *v.* Ramsey, 82 Mo. 133. Or that a wound was "inflamed." Craig *v.* Gerrish, 58 N. H. 513. So a witness can testify that certain things

were done "in a pleasant manner." Alabama R. R. *v.* Frazier, 93 Ala. 45. A witness cannot testify as to "influence" in community. Peck *v.* Small, 35 Minn. 465. But may state that foot-prints "corresponded." Busby *v.* State, 77 Ala. 66. Or that he recognized a walk. Beale *v.* Posey, 72 Ala. 323. But witnesses cannot testify to resemblance of child to his putative father. Eddy *v.* Gray, 4 All. 435; Jones *v.* Jones, 45 Md. 144; Keniston *v.* Rowe, 16 Me. 38. Such witnesses may be examined as to the facts observed by them; but questions as to hypothetical states of fact cannot be asked. Bricker *v.* Lightner, 40 Pa. St. 199; State *v.* Klinger, 46 Mo. 224, 228, 229; Com. *v.* Rich, 14 Gray, 335; Russell *v.* State, 53 Miss. 367; Com. *v.* Pomeroy, 117 Mass. 143, 149; Dunham's Appeal, 27 Conn. 192. A professional man in a matter not studied by him as a specialty is regarded as an ordinary observer. Matteson *v.* N. Y. Cen. R. R. Co., 64 Barb. 364.

Such persons are not *experts*, properly so called; though experts, with the same facilities for observation, may, of course, testify in the same manner and to the same points. The obvious, and perhaps the only, limitation placed on evidence of this nature is that the witness will not be allowed unnecessarily to invade the province of the jury, substituting his opinion for theirs. Where, therefore, the jury can well draw an inference from the facts upon which the witness bases his opinion, and these facts can be placed before the jury, the opinion of the witness is not to be received. Kirby *v.* Ins. Co., 9 Lea (Tenn.), 142; Gavisk *v.* R. R. Co., 49 Mo. 274; Hill *v.* R. R. Co., 55 Me. 438; Mellor *v.* Utica, 48 Wis. 457; Schmick *v.* Noel, 72 Tex. 1; The Attila, 5 Queb. 340, 343; Brown *v.* State, 55 Ark. 593; R. R. *v.* Haynes, 47 Ark. 497; Leitensdorfer *v.* King, 7 Col. 436; Ferguson *v.* Hubbell, 97 N. Y. 507; Brown *v.* Doubleday, 61 Vt. 523; Radam *v.* Capital Microbe Dist. Co., 81 Tex. 122; Trapp *v.* Druecker, 79 Wis. 638; Smith *v.* Hickenbottom, 57 Ia. 733; Seliger *v.* Bastian, 66 Wis. 521; Baker *v.* Madison, 62 Wis. 137; Key *v.* Thomson, 13 New Bruns. 224; Cain *v.* Uhlman, 20 N. Scot. R. 148; Courser *v.* Kirkbride, 23 New Bruns. 404; Wiltse *v.* Tilden, 77 Wis. 152; Stowe *v.* Bishop, 58 Vt. 498; Welch *v.* Ins. Co., 23 W. Va. 288; Neilson *v.* R. R., 58 Wis. 516. But it has been frequently held that any ordinary observer may give an opinion in connection with the facts on which it is based. Armstrong *v.* R. R., 45 Minn. 85; State *v.* Ward, 61 Vt. 153; R. R. *v.* Klaus, 64 Tex. 293. Expert will not be allowed to testify contrary to the judicial knowledge of the court. Com. *v.* Marzynski, 149 Mass. 68. Or on a question of law. Shadburne *v.* Daly, 76 Cal. 355; Young *v.* Ins. Co., 59 Conn. 41; Gilbert *v.* Odum, 69 Tex. 670.

(*b*) *Expert Evidence. When admissible.* — The evidence of a duly qualified expert, though consisting wholly or in part of an opinion with respect to the existence of facts in issue or relevant thereto, is admissible in all cases where, in the judgment of the court, such evidence is fairly calculated to aid the jury or other tribunal of fact. Kershaw *v.* Wright, 115 Mass. 361; Matteson *v.* R. R., 62 Barb. 364; Shelton *v.* State, 34 Tex. 662; Naughton *v.* Stagg, 4 Mo. Ct. App. 271; Young *v.* Johnson, 123 N. Y. 226. The inference of an expert, however, is not admissible as to the existence or non-existence of the fact or facts upon which his opinion is based. Hoener *v.* Koch, Sup. Ct. Ill., 4 L. & Eq. Rep'r, 173; Heald *v.* Thing, 45 Me. 392; Walker *v.* Rogers, 24 Md. 237, 243; Phillips *v.* Starr *et al.*, 26 Ia. 349; Spear *v.* Richardson, 37 N. H. 23, 34. But facts and statements, whether by competent witnesses or by treatises of recognized authority in the science, art, calling, or the like, to which the testimony of an expert relates, which support or are inconsistent with the opinion of such expert, are admissible in evidence, together with the grounds of such opinion. Brodhead *v.* Wiltse, 35 Ia. 429; R. R. *v.* Finlayson, 16 Neb. 578; Eidt *v.* Cutter, 127 Mass. 522; City of Ripon *v.* Bittel, 30 Wis. 614, 619; Schlencker *v.* State, 9 Brown (Neb.), 241, 250; McLeary *v.* Norment, 84 N. C. 235; Stackhouse *v.* Horton, 15 N. J. Eq. 202, 209; White *v.* Bailey, 10 Mich. 155; Ins. Co. *v.* Ellis, 89 Ill. 516. But see Fox *v.* Peninsular Co., 84 Mich. 676; Bloomington *v.* Schrock, 110 Ill. 219; Tucker *v.* Donald, 60 Miss. 460; Marshall *v.* Brown, 50 Mich. 148. Whether an expert be duly qualified is a question for the court. Tucker *v.* R. R., 118 Mass. 546; Towboat Co. *v.* Starrs, 69 Pa. St. 36, 41; Slocovich *v.* Ins. Co., 108 N. Y. 56; Powers *v.* McKenzie, 90 Tenn. 167; Montana R. R. *v.* Warren, 137 U. S. 348.

(*c*) *Who are Experts.* — Persons instructed by a special acquired knowledge or experience with regard to subjects presumably not within the knowledge of ordinary men, are considered experts. Tullis *v.* Kidd, 12 Ala. 648; Muldowney *v.* Ill. Cen. R. R., 36 Ia.

462; Page *v.* Parker, 40 N. H. 47; Oakes *v.* Weston, 45 Vt. 430; Steamboat Clipper *v.* Logan, 18 Ohio, 375; Grigsby *v.* Clear Lake, &c. Co., 40 Cal. 396; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146; Wight Co. *v.* Poczekai, 130 Ill. 139; National Gas Co. *v.* Miethke, 35 Ill. App. 629; R. R. *v.* Thompson, 75 Tex. 501. But see Tucker *v.* R. R., 118 Mass. 546.

(*d*) *Common Subjects of Expert Evidence.* — (1) On a question of sanity it is customary to receive the testimony of persons skilled in that subject. McCurry *v.* Hooper, 12 Ala. 823; Com. *v.* Fairbanks, 2 All. 511; Hoge *v.* Fisher, 1 Pet. C. Ct. 163, 164. A family physician, or one not especially skilled, is in some States considered as an expert. Hastings *v.* Ryder, 99 Mass. 622; Chandler *v.* Barrett, 21 La. An. 58; Davis *v.* State, 35 Ind. 496; State *v.* Reddick, 7 Kans. 143; People *v.* Schuyler, 106 N. Y. 298; Fayette *v.* Chesterville, 77 Me. 28; State *v.* Meyers, 99 Mo. 107. It may be doubted whether, as a matter of principle, such physician can claim any further competency than is accorded an ordinarily intelligent observer with equal facilities for observation. The ordinary observer, however, must state the facts on which his belief is founded. Bank *v.* Wirebach, 106 Pa. St. 37; Haney *v.* Clark, 65 Tex. 93. See Swan *v.* Middlesex, 101 Mass. 173; Real *v.* People, 42 N. Y. 270, *contra.* (2) So the evidence of a physician or surgeon is receivable with regard to matters within the line of his profession. Perkins *v.* R. R., 44 N. H. 223; Lush *v.* McDaniel, 13 Ired. (N. C.) L. 485; Hook *v.* Stovall, 26 Ga. 704; Roberts *v.* Fleming, 31 Ala. 683; Jones *v.* White, 11 Humph. 268; State *v.* Smith, 32 Me. 369; Linsday *v.* People, 63 N. Y. 143; Paty *v.* Martin, 15 La. An. 620; Com. *v.* Piper, 120 Mass. 185; Shelton *v.* State, 34 Tex. 662; State *v.* Morphy, 33 Ia. 270; Patterson *v.* R. R., 89 Ala. 318; Wallace *v.* Vacuum Oil Co., 128 N. Y. 579; Griswold *v.* R. R., 115 N. Y. 61; State *v.* Sheets, 89 N. C. 543. (3) So an attorney may testify to the value of professional services, or to a point of practice. Allis *v.* Day, 14 Minn. 516; Ottawa University *v.* Parkinson, 14 Kans. 159; Mowry *v.* Chase, 100 Mass. 79; Stanton *v.* Embrey, 93 U. S. 548, 557; Williams *v.* Brown, 28 Oh. St. 547. See also Covey *v.* Campbell, 52 Ind. 157; Eagle Manuf. Co. *v.* Browne, 58 Ga. 240; Thompson *v.* Boyle, 85 Pa. St. 477; Eggleston *v.* Boardman, 37 Mich. 14. (4) So of a scientific man in his specialty. Page *v.* Parker, 40 N. H. 47 59; State *v.* Knight, 43 Me. 11; People *v.* Gonzalez, 35 N. Y. 49, 61; Buffum *v.* Harris, 5 R. I. 243. (5) So of other acquired experience. Albright *v.* Corley, 40 Tex. 105; Pettibone *v.* Smith, 37 Mich. 579, 581; Moulton *v.* McOwen, 103 Mass. 587; Sikes *v.* Paine, 10 Ired. (N. C.) L. 280; Dean *v.* McLean, 48 Vt. 412; Transportation Line *v.* Hope, 95 U. S. 297; Moreland *v.* Mitchell Co., 40 Ia. 394; Walker *v.* Fields, 28 Ga. 237. (6) Subscribing witnesses to a will are treated as experts with regard to the sanity of the testator at the time of its execution. Probably this rests on the ground of practical convenience. Needham *v.* Ide, 5 Pick. 510; Titlow *v.* Titlow, 54 Pa. St. 216; Walker *v.* Walker, 34 Ala. 469; Williams *v.* Spencer, 150 Mass. 346; Garrison *v.* Blanton, 48 Tex. 299; Elder *v.* Ogletree, 36 Ga. 64.

As to who are experts with regard to proof of handwriting, see § 232, n. 1, *supra.*

(*e*) *Expert Testimony to Facts* — Experts may, and often do, testify to matter of fact; *e. g.*, (1) The nature or effect of a foreign unwritten law; the practice, law, or usages of another State. Dauphin *v.* U. S., 6 Ct. of Claims, 221; Short *v.* Kingsmill, 7 Q. B. U. C. 350; Arnold *v.* Higgins, 11 Q. B. U. C. 446; Ennis *v.* Smith, 14 How. 400, 426; Dyer *v.* Smith, 12 Conn. 384; Mowry *v.* Chase, 100 Mass. 79; *In re* Roberts' Will, 8 Paige, 446; Crafts *v.* Clark, 38 Ia. 237; Walker *v.* Forbes, 31 Ala. 9; Consol. R. E. Co. *v.* Cashow, 41 Md. 59; Smith *v.* Bartram, 11 Oh. St. 690; Barrows *v.* Downs, 9 R. I. 446; Hall *v.* Castello, 48 N. H. 176. When experts are in conflict court can examine for itself. Rice *v.* Gunn, 4 Ont. Rep. 579. (2) So of the force of language as varied by local, technical, or peculiar usage. Whitney *v.* Boardman, 118 Mass. 242; Astor *v.* Union Ins. Co., 7 Cowen, 202; U. S. *v.* Breed, 1 Sumner, 159, 167; Wilder *v.* DeCou, 26 Minn. 10. (3) Or as to what increases the risk insured against by a policy of insurance. Kern *v.* Ins. Co., 40 Mo. 19; Cornish *v.* Ins. Co., 74 N. Y. 295; Martin *v.* Franklin, 42 N. J. L. 46. But see Milw. &c. R. R. Co. *v.* Kellogg, 94 U. S. 469, 472; Cannell *v.* Ins. Co., 59 Me. 582; Kirby *v.* Ins. Co., 9 Lea (Tenn.), 142; Luce *v.* Ins. Co., 105 Mass. 297. (4) So when a physician testifies to the well-known effect of certain poisons. Stephens *v.* People, 4 Parker, C. R. 396, 404, 436 *et seq.* A trained nurse cannot so testify. Osborne *v.* Troup, 60 Conn. 485.

(5) Or as to the undisputed conditions of gestation. State *v.* Smith, 32 Me. 369; Young *v.* Makepeace, 103 Mass. 50.

(*f*) *Form of Question.* — The proper form of question to be asked an expert witness properly so called is a little in controversy. The usual and unexceptionable form is the hypothetical, — facts being in dispute, the question assumes a certain number of such facts as basis for the opinion asked. 5 Am. L. R. 432; U. S. *v.* McGlue, 1 Curtis, C. Ct. 1; Miller *v.* Smith, 112 Mass. 470; Guiterman *v.* Liverpool, &c. S. S. Co., 83 N. Y. 358; Spear *v.* Richardson, 37 N. H. 23; Hathaway *v.* Ins. Co., 48 Vt. 335; Poole *v.* Dean, 152 Mass. 589; Southern Bell Co., *v.* Jordan, 87 Ga. 69; Goodwin *v.* State, 96 Ind. 550; *In re* Norman's Will, 72 Ia. 84; Bowen *v.* Huntington, 35 W. Va. 682; Baltimore Co. *v.* Cassell, 66 Md. 419; Choice *v.* State, 31 Ga. 424; Bishop *v.* Spining, 38 Ind. 143; Wright *v.* Hardy, 22 Wis. 348; Crawford *v.* Wolf, 29 Ia. 567; Tingley *v.* Cowgill, 48 Mo. 291. There must, however, be some stated basis of fact for the hypothetical question. Guetig *v.* State, 66 Ind. 94; Bomgardner *v.* Andrews, 55 Ia. 638; Eastham *v.* Riedell, 125 Mass. 585; Gottlieb *v.* Hartman, 3 Col. T. 53; People *v.* Augsbury, 97 N. Y. 501; Kearney *v.* State, 68 Miss. 233; R. R. *v.* Compton, 75 Tex. 667; Fraser *v.* Jennison, 42 Mich. 206. See also Brown *v.* Huffard, 69 Mo. 305. Witness cannot testify on conflicting evidence. Arenicendaiz *v.* Stillman, 67 Tex. 458. Or on hearsay evidence. Vosburg *v.* Putney, 78 Wis. 84. Where, however, the facts are few and undisputed, there seems no objection to requesting an opinion "on the evidence in the case." State *v.* Hayden, 51 Vt. 296; Page *v.* State, 61 Ala. 16; Carpenter *v.* Blake, 2 Lans. 206; Hand *v.* Brookline, 126 Mass. 324; Tingley *v.* Cowgill, 48 Mo. 291; Sikes *v.* Paine, 10 Ired. (N. C.) L. 280; Schneider *v.* Manning, 121 Ill. 376; Jones *v.* R. R., 43 Minn. 279; Gates *v.* Fleischer, 67 Wis. 504; People *v.* McElvaine, 121 N. Y. 250; Diffin *v.* Dow, 22 New Bruns. 107, *contra*. See also Gilman *v.* Strafford, 50 Vt. 723; Hunt *v.* Gas. Co., 8 All. 169.

CHAPTER VII.

SELF-REGARDING EVIDENCE.

SECTION I.

SELF-REGARDING EVIDENCE IN GENERAL.

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§ 518. In the preceding chapters we have shown the general nature of those rules by which evidence is rejected for want either of originality or of proximity. The present will be devoted to that species of evidence for or against a party which is afforded by the language or demeanour of himself, or of those whom he represents, or of those who represent him. All such evidence we purpose to designate by the expression "self-regarding." When in favour of the party supplying it, the evidence may be said to be "self-serving;" when otherwise, "self-harming" (*a*).

§ 519. The rule of law with respect to self-regarding evidence is, that when in the self-*serving* form it is not in general receivable;

(*a*) Two of these three terms are taken from Benth. Jud. Ev. vol. 5, p. 204. The term "self-harming" is substituted by the present editor for Bentham's "self-disserving," which the author had also adopted.

but that in the self-*harming* form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind (*b*).[1] For, although, when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to the declarations of one man, may not in particular cases have some probative force as evidence against another, — still our law rejects them (*c*) in obedience to its great principle, which requires judicial evidence to be proximate; and also from the peculiar temptations to fraud and fabrication, which the allowing such evidence would so obviously supply. This is a branch of the general rule that a man shall not be allowed to make evidence for himself (*d*). But, on the other hand, the universal experience of mankind testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.

§ 520. The subject of self-*serving* evidence may therefore be despatched in few words, and indeed has been substantially considered under the title "res inter alios acta alteri nocere non debet" (*e*). There are, however, some exceptions to the rule excluding it. The first is, that where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains (*f*). This exception is founded on the plain principle of justice that, by using a man's statement against him, you adopt that statement, as *evidence* at least. The civilians seem to have gone farther. "Observe," says Pothier (*g*), "that when I have no other proof than your confession, I cannot divide it. Suppose, for instance, that I claim from you 200 livres, which I allege that you have borrowed, and of which I demand the payment. You admit the loan, but add that you have repaid it; I cannot found a proof of the loan upon your confession, which is, at the same time, a proof of payment; for I can only use it against you such as it is, and taking it altogether. Si quis confessionem adversam allegat, vel depositionem testis, dictam cum suâ quantitate approbare tenetur." This was probably just enough under

(*b*) Gilb. Ev. 119, 4th Ed.; Finch, Law, 37; Trials per Pais, 381. See acc. Mascard. de Prob. quæst. 7, n. 10.

(*c*) 2 Campb. 389, and *suprà*, bk. 1, pt. 1, § 91.

(*d*) 3 B. & A. 144. See *suprà*, ch. 5, § 506.

(*e*) *Suprà*, ch. 5.

(*f*) Tayl. Ev. § 655; Peake, Ev. 16, 5th Ed.; 2 Ev. Poth. 156–158; *Randle* v. *Blackburn*, 5 Taunt. 245; *Thomson* v. *Austen*, 2 D. & Ryl. 358; *Smith* v. *Blandy*, Ry. & M. 257; *Darby* v. *Ouseley*, 2 Jur. N. S. 497.

(*g*) 1 Ev. Poth. § 799.

[1] For the American rule as to admissions, see *infra*, p. 485.

their judicial system; but with us, while the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-harming portion of it, or vice versâ (*h*). Again, a person on his trial may, at least if not defended by counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove; and the jury may act on that statement if they deem it worthy of credit (*i*). Care must likewise be taken not to confound self-serving evidence with res gestæ. The language of a party, accompanying an act which is evidence in itself, may form part of the res gestæ, and be receivable as such.[1]

§ 521. We return therefore to the more important and difficult subject of self-*harming* evidence. This may be supplied by *words*, *writing*, *signs*, or *silence*. "Non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis" (*j*). Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable (*k*): while of signs it has justly been said, "Acta exteriora indicant interiora secreta" (*l*). Thus, a deaf and dumb person may be called on to plead, or to advocate his cause through the medium of an interpreter who can explain his signs to the court and jury (*m*). So of silence, "Qui tacet, consentire videtur" (*n*), — a maxim which must be taken with considerable limitation. A far more correct exposition of the principle contained in it is the following: "Qui tacet, non utique fatetur: sed tamen verum est, eum non negare" (*o*); and one of our old authorities tells us with truth, "Le nient dedire n'est cy fort come le confession est" (*p*), which seems fully recognised in modern times (*q*). The maxim is also found guarded in this way, "Qui tacet consentire videtur, ubi tractatur de ejus commodo" (*r*). The principal application of this maxim is in criminal cases, where a person charged with having committed an offence makes no reply; the force and effect of which will be more fully considered in another place (*s*).

(*h*) See *Baildon* v. *Walton*, 1 Exch. 617.

(*i*) See bk. 4, pt. 1.

(*j*) 10 Co. 144 a. See *Ford* v. *Elliott*, 4 Exch. 78.

(*k*) *R.* v. *Simons*, 6 C. & P. 540.

(*l*) 8 Co. 146 b; Wing. Max. 108; Broom's Max. 292, 4th Ed.

(*m*) *R.* v. *Jones*, 1 Leach, C. L. 102; *R.* v. *Steel*, *Id.* 451.

(*n*) Broom's Maxims, 6th Ed. 134; Hob. 102; Jenk. Cent. 1, Cas. 64; Cent. 2, Cas. 30; Cent. 5, Cas. 87; Sext. Decretal. lib. 5, tit. 12, De Reg. Juris, Reg. 43.

(*o*) Dig. lib. 50, tit. 17, l. 142. See also Sext. Decretal. lib. 5, tit. 12, De Reg. Juris, Reg. 44.

(*p*) Long. Quint. 125, 126.

(*q*) *Hayslep* v. *Gymer*, 1 A. & E. 162. See *Morgan* v. *Evans*, 3 Cl. & F. 205; *Gaskill* v. *Skene*, 14 Q. B. 664, and *Boyle* v. *Wiseman*, 10 Exch. 651.

(*r*) 20 Hen. VI. 13 b.

(*s*) See *infrà*, sect. 3, sub-sect. 3.

[1] Conf. § 495, n. 1, *supra*.

§ 522. As to the different kinds of self-harming statements. In the first place, they are either "judicial" or "extra-judicial," — *in judicio* or *extra judicium* (*t*), — according as they are made in the course of a judicial proceeding, or under any other circumstances.

§ 523. 2. Self-harming statements in civil cases are usually called "admissions," and those in criminal cases "confessions." The civilians and canonists express all kinds under the term "confessio."

§ 524. 3. Self-harming statements are divisible into "plenary" and "not plenary." A "plenary" confession is when a self-disserving statement is such as, if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates; as where a party accused of murder says, "I murdered," or "I killed," the deceased. In such cases the proof is in the nature of *direct* evidence, and the maxim is, "Habemus optimum testem, confitentem reum" (*u*). A confession "not plenary" is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumptive inference of their truth, and is therefore in the nature of *circumstantial* evidence (*v*). *E. g.*, A. is found murdered, or the goods of B. are proved to have been stolen, and the accused or suspected person says, "I am very sorry that I ever had anything to do with A.," or "that I ever meddled with the goods of B." These expressions are obviously ambiguous; for although consistent with an intention to avow guilt, they are equally so with an expression of regret that circumstances should have occurred to cast unjust suspicion on the speaker. So where a person accused of an offence admits that he intended or even threatened to commit it, or that he fled to avoid being tried for it (*x*); or where a party to an action has requested other persons to make false statements at the trial (*y*).

§ 525. Although, as already stated, self-harming evidence is in general admissible against the party supplying it, it has been made a great question whether this extends to the proof of the contents of written instruments or documents; *i. e.*, whether the principle that such are the best or primary evidence of their own contents does not override the principle under consideration. Elementary as this point may seem, it has only been settled of late years, if indeed it can be

(*t*) 1 Greenl. Ev. § 216, 7th Ed.; 1 Ev. Poth. §§ 797, 801.

(*u*) Ph. & Am. Ev. 419; 2 Hagg. C. R. 315.

(*v*) 3 Benth. Jud. Ev. 108.

(*x*) See *suprà*, ch. 2, sect. 3, sub-sect. 3.

(*y*) *Moriarty* v. *London, Chatham, and Dover Railway Company*, L. R., 5 Q. B. 314.

deemed fully settled even now; and there is probably not one question to be found in the whole law of England which has caused greater difference of opinion. After a long series of irreconcilable dicta and rulings at nisi prius (*z*), the subject came before the Court of Exchequer in 1840, in *Slatterie* v. *Pooley* (*a*). There the question was, whether a debt for which an action has been brought by one J. T. against the plaintiff was included in the schedule to a certain composition deed. The schedule being inadmissible as evidence for want of a proper stamp, a verbal admission by the defendant, that the debt in question was the same with that entered in the schedule, was rejected by Gurney, B., at nisi prius; on the ground that the contents of a written instrument, which is itself inadmissible for want of a proper stamp, cannot be proved by parol evidence of any kind. The plaintiff having been nonsuited, a rule was obtained for a new trial, against which cause was shown, and several of the previous cases cited. The court, however, — consisting of Parke, Alderson, Gurney, and Rolfe, BB., — having taken time to consider, unanimously made the rule absolute, without hearing counsel in support of it. Parke, B., in delivering his judgment, observed: "We entertain no doubt that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs. If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case, where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible."

§ 526. The authority of *Slatterie* v. *Pooley*, at least so far as relates to extra-judicial statements, has been recognised and acted on in a

(*z*) These will be found collected in an article by the author in the Monthly Law Mag. vol. 5, p. 175.

(*a*) 6 M. & W. 664.

great many cases (*b*), but has been severely attacked in Ireland (*c*), and has been questioned in this country (*d*).[1] In *Lawless* v. *Queale* (*e*), Lord Chief Justice Pennefather, speaking of that case, says: "The doctrine there laid down is a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise encumbered it; and thus, by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." Now we must protest in toto against trying the *admissibility* of evidence by such a test as this. The most respectable and innocent man in the community may be hanged for murder on the unsupported testimony of a pretended accomplice, or sent to penal servitude for rape on the unsupported oath of an avowed prostitute; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices or prostitutes, or do innocent men feel themselves in danger from it? The weight of the species of proof under consideration varies ad infinitum. Look at the different forms in which it may present itself, — plenary confession in judicio; non-plenary confession in judicio; plenary quasi-judicial confession before a justice of the peace; non-plenary quasi-judicial confession before a justice of the peace; plenary extra-judicial confession to several respectable witnesses; the like to one such witness; non-plenary extra-judicial confession to several respectable witnesses; the like to one such; plenary extra-judicial confession to several suspected witnesses; the like to one such; non-plenary extra-judicial confession to several suspected witnesses; the like to one such: and under the term "non-plenary" is included every possible degree of casual observation, or even sign, from which the existence of the principal fact may be collected. The shade between the probative force of any two of these degrees is so slight as to be almost imperceptible, and yet of all forms of evidence, the highest of these is perhaps the most satisfactory, and

(*b*) *Howard* v. *Smith*, 3 Scott, N. R. 574; *Boulter* v. *Peplow*, 9 C. B. 493; *Pritchard* v. *Bagshawe*, 11 *Id.* 459; *King* v. *Cole*, 2 Exch. 628; *Boileau* v. *Rutlin*, 2 Exch. 665; *Ridley* v. *The Plymouth Grinding Company*, 2 Exch. 711; *Toll* v. *Lee*, 4 *Id.* 230; *Murray* v. *Gregory*, 5 Exch. 468; *R.* v. *The Inhabitants of Basingstoke*, 14 Q. B. 611; *R.* v. *Welch*, 2 Car. & K. 296; 1 Den. C. C. 199; *Ansell* v. *Baker*, 3 Car. & K. 145, &c.

(*c*) *Lawless* v. *Queale*, 8 Ir. Law Rep. 382.

(*d*) Tayl. Ev. §§ 382 *et seq.*; *Sanders* v. *Karnell*, 1 F. & F. 356.

(*e*) *Lawless* v. *Queale*, 8 Ir. Law Rep. 382. See the observations of Crampton, J., in that case; and also *Thunder* v. *Warren*, *Id.* 181.

[1] See also § 215, n. 1, C. III. (*a*), *supra*

the lowest the most dangerous. The *value* of self-harming evidence, like that of every other sort of evidence, is for the jury; its *admissibility* is a question of law, — the test of which is, to see if the evidence tendered is in its nature original and proximate (*f*); and it will scarcely be contended that self-harming statements of all kinds do not fulfil both those conditions. It may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written; but that is a maxim which has been much misunderstood (*g*). The contents of a document could most unquestionably be proved by a chain of circumstantial evidence composed of *acts*, every link in which might be established by parol or verbal testimony.

§ 527. But although a party might admit the contents of a document, he could not, before the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by admitting the *execution* of a deed (except when such admission was made for the purpose of a cause in court), dispense with proof of it by the attesting witness. The rule "Omnia præsumuntur ritè esse acta" was here reversed, — the courts holding that although a party admitted the execution of a deed, the attesting witnesses might be acquainted with circumstances relative to its execution, which were unknown to the party making the admission, and which might have the effect of invalidating the deed altogether (*h*). The decisions establishing this dogma were previous to *Slatterie* v. *Pooley*, and seem to have been a remnant of the old practice of trying deeds by the witnesses to them (*i*). And the rule was not affected by the alteration made in the law by 14 & 15 Vict. c. 99, which rendered the parties to a suit competent witnesses (*k*). But now, by the 17 & 18 Vict. c. 125, s. 26, any instrument, to the validity of which attestation is not requisite, "may be proved by admission or otherwise, as if there had been no attesting witness thereto."

§ 528. So far as its admissibility in evidence is concerned, it is in general immaterial *to whom* a self-harming statement is made (*l*). But if coming under the head of what the law recognises as confidential communication, it will not be received in evidence (*m*); neither will it, if embodied in a communication made "without prejudice," the object of such being to buy peace, and settle disputes by com-

(*f*) See bk. 1, pt. 1, §§ 88, 89, 90.

(*g*) See bk. 2, pt. 3, § 223.

(*h*) *Call* v. *Dunning*, 4 East, 53; *Abbot* v. *Plumbe*, 1 Doug. 216; *Johnson* v. *Mason*, 1 Esp. 89; *Cunliffe* v. *Sefton*, 2 East, 183; *Barnes* v. *Trompowsky*, 7 T. R. 265.

(*i*) See bk. 2, pt. 3, §§ 220–221.

(*k*) *Whyman* v. *Garth*, 8 Exch. 803.

(*l*) The old French lawyers drew some nice distinctions as to the effect of statements made to the opposite party or to strangers. See 1 Ev. Poth. § 801.

(*m*) See *infrà*, ch. 8.

promise instead of by legal proceedings (*n*). It has indeed been held that, in order to render an account stated binding on a party, the admission of liability must be made to the opposite party or his agent (*o*); but this only refers to the effect of the admission, not to its admissibility. A distinction was formerly sought to be drawn where a confession was made by a prisoner, in consequence of an inducement to confess, held out by a party who had no authority over him or the charge against him. Although such an inducement does not exclude confessions made to others (*p*), it was doubted whether it would not exclude confessions made to the person holding out the inducement; but this distinction has been overruled (*q*).

§ 529. Self-harming statements, &c., made by a party when his mind is not in its natural state, ought, in general, to be received as evidence, and his state of mind should be taken into consideration by the jury as an infirmative circumstance (*r*). Thus a confession made by a prisoner when drunk has been received (*s*); and although contracts entered into by a party in a state of total intoxication are void, it is otherwise where the intoxication is only partial, and not sufficient to prevent his being aware of what he is doing (*t*). So what a person has been heard to say while talking in his sleep seems not to be legal evidence against him (*u*), however valuable it may be as indicative evidence (*v*); for here the suspension of the faculty of judgment may fairly be presumed complete. The acts of persons of unsound mind also are not in general binding; but this is subject to some exceptions, which will be found collected in the case of *Molton* v. *Camroux* (*x*).

§ 530. A party is not in general prejudiced by self-harming statements made under a mistake of *fact*. "Ignorantia facti excusat" (*y*). "Non videntur, qui errant, consentire" (*z*), and "Non fatetur qui errat" (*a*), said the civilians. So money paid under a forgetfulness

(*n*) *Cory* v. *Bretton*, 4 C. & P. 462; *Healey* v. *Thatcher*, 8 *Id.* 388; *Paddock* v. *Forrester*, 3 M. & Gr. 903.

(*o*) *Breckon* v. *Smith*, 1 A. & E. 488, per Littledale, J.; *Hughes* v. *Thorpe*, 5 M. & W. 667, per Parke, B.; *Bates* v. *Townley*, 2 Exch. 156, per Parke, B.

(*p*) *R.* v. *Dunn*, 4 C. & P. 543; *R.* v. *Spencer*, 7 *Id.* 776

(*q*) *R.* v. *Taylor*, 8 C. & P. 733.

(*r*) "Circa ejusmodi instrumenta firmanda vel destruenda, multum habet operis oratio, si quæ sint voces per vinum, somnium, dementiam emissæ." Quint. Inst. Orat. lib. 5, c. 7.

(*s*) *R.* v. *Spilsbury*, 7 C. & P. 187.

(*t*) *Gore* v. *Gibson*, 13 M. & W. 623; 9 Jur. 140, and the note there, p. 142. See also Mascard. de Prob. Concl. 580.

(*u*) This point arose in *R.* v. *Elizabeth Sippets*, Kent Summ. Ass. 1839, where Tindal, C. J., was inclined to think the evidence not receivable. Ex relatione. See also per Alderson, B., in *Gore* v. *Gibson*, 13 M. & W. 623, 627.

(*v*) Bk. 1, pt. 1, § 93.

(*x*) 2 Exch. 487; affirmed on error, 4 *Id.* 17.

(*y*) Lofft, M. 553.

(*z*) Dig. lib. 50, tit. 17, l. 116.

(*a*) 1 Ev. Poth. § 800.

of facts, which were once within the knowledge of the party paying, may be recovered back (*b*). But it is very different when the confession is made under a mistake of *law*. Here the civilians say, "Non fatetur qui errat, nisi jus ignoravit" (*c*). Neither is a party to be prejudiced by a *confessio juris* (*d*), although this must be understood with reference to a confession of law not involved with facts; for the confession of a matter compounded of law and fact is receivable. Every prisoner or defendant who pleads guilty in a criminal case admits by his plea both the acts with which he is charged, and the applicability of the law to them. So, on an indictment for bigamy, the first marriage, even though solemnised in a foreign country, may be proved by the admission of the accused (*e*).

§ 531. Self-harming statements may in general be made, either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorised, — an application of the maxims, "Qui per alium facit, per seipsum facere videtur" (*f*); "Qui facit per alium facit per se" (*g*). This of course means that the party against whom the admission or confession is offered in evidence is of capacity to make such admission or confession. On this subject the civilians laid down, "Qui non potest donare non potest confiteri" (*h*). So there are some acts which cannot be done by attorney, and some persons who cannot appoint one, — as, for instance, infants. And the person appointed to act for another cannot delegate this authority to a third, it being a maxim of law, "Delegata potestas non potest delegari" (*i*), "Delegatus non potest delegare" (*k*).

(*b*) *Kelly* v. *Solari*, 9 M. & W. 54, and the cases there referred to.

(*c*) Dig. lib. 42, tit. 2, l. 2; 1 Ev. Poth. § 800. See *suprà*, ch. 2, sect. 2, sub-sect. 1.

(*d*) 1 Greenl Ev. § 96, 7th Ed.

(*e*) 1 East, P. C. 471; *R.* v. *Newton*, 2 Moo. & R. 503; *R.* v. *Simmonsto*, 1 Car. & K. 164. But see *R.* v. *Flaherty*, 2 *Id.* 782.

(*f*) Co. Litt. 258 a; 4 Inst. 109; 10 Co. 33 b; 2 Jur. N. S. 18. See also Sext. Decret. lib. 5, tit. 12, De Reg. Jur. Reg. 72.

(*g*) Lofft, M. 163; Broom's Maxims, 6th Ed. 799.

(*h*) 1 Ev. Poth. § 804.

(*i*) 7 C. B. N. S. 496, 498; 2 Inst. 597.

(*k*) Broom's Max. 796, 6th Ed.

AMERICAN NOTES.

(§ 519) Admissions. — (*a*) *Rule.* — Statements suggesting the existence or non-existence of a fact in issue or a fact relevant thereto, if made by a substantial party to the record or by one identified with such party in legal interest and during the continuance of such interest, are admissible against the person by whom or on whose account such statements are made. 1 Greenl. Ev. §§ 169–212; 2 Whar. Ev. § 1075 *et seq.*; Pence *v.* Makepeace, 65 Ind. 345; Secor *v.* Pestana, 37 Ill. 525; Powell *v.* Tarry, 77 Va 250; Mears *v.* Cornwall, 73 Mich. 78; Potter *v.* Mellen, 41 Minn. 487; Ector *v.* Welsh, 29 Ga. 443; Saveland *v.* Green, 40 Wis. 431; Plummer *v.* Currier, 52 N. H. 287; Goodnow *v.* Parsons,

36 Vt. 46; East Brandywine, &c. R. R. *v.* Ranck, 78 Pa. St. 454; Robinson *v.* Stuart, 68 Me. 61. That such statements are made when examined as a witness in another suit, does not alter the rule. Carr *v.* Griffin, 44 N. H. 510; Buddee *v.* Spangler, 12 Col. 216; Tooker *v.* Gormer, 2 Hilt (N. Y.) 71; Beeckman *v.* Montgomery, 14 N. J Eq. 106; Lorenzana *v.* Camarillo, 45 Cal. 125; McAndrews *v.* Santee, 57 Barb. 193; Woods *v.* Gevecke, 28 Ia. 561. Or that maker is deceased. Crowe *v.* Colbeth, 63 Wis. 643. Nor is it material that a written admission is contained in a document void as an obligation. Hickey *v.* Hinsdale, 12 Mich. 99; Ayres *v.* Bane, 39 Ia. 518; Morrell *v.* Cawley, 17 Abb. (N. Y.) Prac. 76; Atkins *v.* Plympton, 44 Vt. 21; Reis *v.* Hellman, 25 Oh. St. 180; Huffman *v.* Cartwright, 44 Tex. 296. May be in a form; *e. g.*, a book-entry. McNutt *v.* McDonald, 3 Nova Scotia, Dec. 175. Or through a telephone. Wolfe *v.* R. R., 97 Mo. 473. That admissions in civil suits are procured by inducement or constraint does not affect their admissibility in the absence of illegal duress. 1 Greenl. Ev. § 193; Tilley *v.* Damon, 11 Cush. 247; Newhall *v.* Jenkins, 2 Gray, 562; Foss *v.* Hildreth, 10 All. 76, 83. Conf. § 551, n. 1 (*e*), *infra*.

(*b*) *Identity in Legal Interest.* — Admissions affect a party to the record, if made by one who is privy in law. Smith *v.* Maine, 25 Barb. 33; Emerson *v.* Thompson, 16 Mass. 429; McNight *v.* McNight, 20 Wis. 446. By one privy in blood. Littlefield *v.* Littlefield, 51 Wis. 23, 28; Tilton *v.* Emery, 17 N. H. 536; Fetherly *v.* Waggoner, 11 Wend. 599; Spaulding *v.* Hallenbeck, 35 N. Y. 204, 207. See also *dictum* in Gibney *v.* Marchay, 34 N. Y. 301, 303. Or by one privy in estate. Mueller *v.* Rebhan, 94 Ill. 142. *E. g.*, admissions by a grantor, while holding title, are evidence against his grantee. Ozment *v.* Anglin, 60 Ga. 242; McFadden *v.* Ellmaker, 52 Cal. 348; Rose *v.* Adams, 22 Hun, 389; Gratz *v.* Beates, 45 Pa. St. 495; Norton *v.* Pettibone, 7 Conn. 319; McDowell *v.* Goldsmith, 6 Md. 319; Head *v.* Halford, 5 Rich. (S. C.) Eq. 128; Simpson *v.* Dix, 131 Mass. 179; Baucum *v.* George, 65 Ala. 259; Mueller *v.* Rebhan, 94 Ill. 142; Hancock *v.* Tram Co., 65 Tex. 225; Dooley *v.* Baynes, 86 Va. 644; Flagg *v.* Mason, 141 Mass. 64; Payson *v.* Good, 5 New Bruns. 272; Doe d. Lonchester *v.* Murray, 5 New Bruns. 335; Sartell *v.* Scott, 11 New Bruns. 166. So of an opinion as to value of land by the owner. Patch *v.* Boston, 146 Mass. 52. See also Payne *v.* Croft, 7 Watts & Serg. 458, *contra*. But a grantor cannot directly impeach his own deed. Vrooman *v.* King, 36 N. Y. 477; Renwick *v.* Renwick, 9 Rich. (S. C.) 50; Myers *v.* McKenzie, 26 Ill. 36; Short *v.* Tinsley, 1 Metc. (Ky.) 397; Ferguson *v.* Staver, 33 Pa. St. 411. Nor can admissions by a grantor made after conveyance bind his grantee. Enders *v.* Richards, 33 Mo. 598; Zimmerman *v.* Lamb, 7 Minn. 421; Stribling *v.* Brougher, 79 Ind. 328; Monroe *v.* Napier, 52 Ga. 385; McLaughlin *v.* McLaughlin, 91 Pa. St. 462; Dorr *v.* School Dist., 40 Ark. 237; Fyffe *v.* Fyffe, 106 Ill. 646; Wallace *v.* Laidlaw, 2 R. & G. (N. Scot.) 420; Bullock *v.* Smith, 72 Tex. 545. The statement, however, may be made in any form. Maps, monuments, and recitals in deeds may be evidence of admissions against title. Davis *v.* Sherman, 7 Gray, 291; Grubb *v.* Grubb, 74 Pa. St. 25; Anderson *v.* Kent, 14 Kans. 207; Davis *v.* Jones, 3 Head, 603. Such admissions cannot be received to contradict a title of record. Gibney *v.* Marchay, 34 N. Y. 301; Dodge *v.* Savings Co., 93 U. S. 379. Whether the admission of a cestui que trust binds the trustee is in dispute. That it does, see McDonald *v.* Wright, 12 Grant's Ch. Rep. 552. But see Warren *v.* Carey, 145 Mass. 78, *contra*. So admissions by an assignor of personal property made before assignment are in general evidence against the assignee. Hatch *v.* Dennis, 1 Fairf. 244; Snelgrove *v.* Martin, 2 McCord, 241, 243; Adams *v.* Davidson, 10 N. Y. 309; Hayward Rubber Co. *v.* Duncklee, 30 Vt. 29; Randegger *v.* Ehrhardt, 51 Ill. 101. Whether such admissions by an assignor, made after assignment, are evidence against the assignee, is in dispute. Truax *v.* Slater, 86 N. Y. 630. The general rule is that such statements are not admissible. Butler *v.* Millett, 47 Me. 492; Sargeant *v.* Sargeant, 18 Vt. 371; Owings *v.* Low, 5 G. & J. 134, 145; Truax *v.* Slater, 86 N. Y. 630; Many *v.* Jagger, 1 Blatch. 372; Benson *v.* Lundy, 52 Ia. 265; Randegger *v.* Ehrhardt, 51 Ill. 101; Pier *v.* Duff, 63 Pa. St. 59; Garrahy *v.* Green, 32 Tex. 202. See also Mandeville *v.* Welch, 5 Wheat. 277, 283.

(*c*) *Joint Interest.* — Admissions affect a substantial party to the record, in the absence of fraud, if made by a person jointly interested with said party. Dickinson *v.* Clarke, 5 W. Va. 280; Coit *v.* Tracy, 8 Conn. 268, 276; Barrick *v.* Austin, 21 Barb. 241; Camp *v.*

Dill, 27 Ala. 553; Bank of U. S. *v.* Lyman, 20 Vt. 666, 670. But see also Wallis *v.* Randall, 81 N. Y. 164; Irwin *v.* West, 81* Pa. St. 157; Rapier *v.* Ins. Co., 57 Ala. 100, *contra*. Conf. Bell *v.* Morrison, 1 Pet. 351. Whether acknowledgment of a debt, or its part payment, by one joint promisor, takes the debt out of the Statute of Limitations, is a question in dispute. The weight of authority is that it does not. 1 Greenl. Ev. § 112, n. 3; Shoemaker *v.* Benedict, 11 N. Y. (1 Kernan) 176; Bell *v.* Morrison, 1 Pet. 351; Bush *v.* Stowell, 71 Pa. St. 208; Ellicott *v.* Nichols, 7 Gill, 85, 97, 103.

(*d*) *Interest in Result.* — Admissions, it has been held, bind parties of record, if made by persons having a substantial interest in the result at the time such admissions were made. Tyler *v.* Ulmer, 12 Mass. 163; Robinson *v.* Hutchinson, 31 Vt. 443; Tredwell *v.* Graham, 88 N. C. 208; Riehl *v.* Evansville Association, 104 Ind. 70; Milton *v.* Hunter, 13 Bush (Ky.), 163; Bigelow *v.* Foss, 59 Me. 162; Pike *v.* Wiggin, 8 N. H. 356. See also Stein *v.* R. R. Co., 7 Leg. Gazette, 223. That there must be a joint interest, not a mere community of interest, see Forsyth *v.* Ganson, 5 Wend. 558; Forney *v.* Ferrell, 4 W. Va. 729; Hayes *v.* Barkam, 67 Ind. 359; Smith *v.* Vincent, 15 Conn. 1; Osgood *v.* Manhattan Co., 3 Cowen, 612; Hauberger *v.* Root, 6 Watts & Serg. 431, 435. See also Dan *v.* Brown, 4 Cowen, 483, 492. And the court must first be satisfied, by evidence *aliunde*, that such joint interest exists. Boswell *v.* Blackman, 12 Ga. 591; Rich *v.* Flanders, 39 N. H. 304, 336; Whitney *v.* Ferris, 10 Johns. 66. That admissions may be binding though made by a nominal party to the record, see Tenney *v.* Evans, 14 N. H. 343; Beatty *v.* Davis, 9 Gill, 211; Campbell *v.* Day, 16 Vt. 558. But see also Eitelgeorge *v.* Building Association, 69 Mo. 52

(*e*) *Person referred to.* — Statements by a third person have the effect of admissions against the party who has expressly referred another to such third person for final information with regard to a matter in dispute. Turner *v.* Yates, 16 How. 14; Chapman *v.* Twitchell, 37 Me. 59, 61; Chadsey *v.* Greene, 24 Conn. 562; Over *v.* Schiffling, 102 Ind. 191; Bedell *v.* Ins. Co., 3 Bosw. 147, 154. See also Allen *v.* Killinger, 8 Wall. 480; Smith *v.* Ætna Life Ins. Co., 49 N. Y. 211.

(*f*) *Admissions by Agents.* — The power of an agent to bind his principal by admissions is regulated by the general law of agency. His admissions are binding when his other acts would be; to wit, when engaged on the business of his principal and acting within the scope of his actual or ostensible authority. 1 Greenl. Ev. § 113; Story, Agency, §§ 87–106, 134–137, 259, 260; Cliquot's Champagne, 3 Wall. 114, 140; Thomas *v.* Sternheimer, 29 Md. 268; Weeks *v.* Barron, 38 Vt. 420; Tuttle *v.* Turner, 28 Tex. 759; Central Branch, &c. R. R. *v.* Butman, 22 Kans. 639; Peck *v.* Ritchey, 66 Mo. 114; Merchants' &c. Co. *v.* Leysor, 89 Ill. 43; Charleston, &c. R. R. Co. *v.* Blake, 12 Rich. (S. C.) Law, 634; Verry *v.* R. R., 47 Ia. 549; Black *v.* Baylees, 86 N. C. 527; Baltimore, &c. R. R. Co. *v.* Campbell, 36 Oh. St. 647; Demeritt *v.* Meserve, 39 N. H. 521; Indianapolis, &c. R. R. Co. *v.* Tyng, 63 N. Y. 653; Columbia Ins. Co. *v.* Masonheimer, 76 Pa. St. 138; R. R. *v.* Sherwood, 84 Tex. 125; Mining Syndicate *v.* Fraser, 130 U. S. 611; Baldwin *v.* Doubleday, 59 Vt. 7; Beasley *v.* San Jose Co., 92 Cal. 388; Edmunds *v.* Curtis, 8 Col. 605; Williams *v.* Edwards, 94 Mo. 447; Cleveland Stove Co. *v.* Hovey, 26 Neb. 624; Southerland *v.* R. R., 106 N. C. 100; Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St. 449; Doe d. McDonald *v.* Long, 4 U. C. Q. B. 146; Grant *v.* Ætna Ins. Co., 11 L. C. R. 128. So statement of agent after completion of his agency is inadmissible. Redpath *v.* Ins. Co., 14 L. C. Jur. 90. See also Green *v.* No. Buffalo, 56 Pa. St. 110; Griffin *v.* R. R. Co., 26 Ga. 111; Packet Co. *v.* Clough, 20 Wall. 528, 540; Franklin Bank *v.* Stewart, 37 Me. 519; Stiles *v.* Western R. R. Co., 8 Metc. 44; Rowe *v.* Canney, 139 Mass. 41. It therefore by no means follows that statements by an agent constitute an admission simply because they would constitute one if made by the principal. Memphis, &c. R. R. Co. *v.* Maples, 63 Ala. 60*. The declaration of the agent is not proof of his agency. R. R. Co. *v.* Cocke, 64 Miss. 713; Pepper *v.* Cairns, 133 Pa. St. 114; Noel *v.* Denman, 76 Tex. 306; Baker *v.* Gerrish, 14 All. (Mass.) 201; Chapman *v.* Masson, Q. B. 9 L. C. R. 422. A father is not by virtue of his relationship the agent of his infant son. Haney *v.* Donnelly, 12 Gray, 361.

(1) *Husband and Wife.* — Under these limitations admissions by a wife are evidence against her husband, and *vice versa*. Rose *v.* Chapman, 44 Mich. 312; Goodrich *v.*

Tracy, 43 Vt 314; Butler *v.* Price, 115 Mass. 578; Riley *v.* Suydam, 4 Barb. 222. See also Caswell *v.* Hill, 47 N. H. 407; Jordan *v.* Hubbard, 26 Ala. 433; Crain *v.* Wright, 46 Ill. 107.

(2) *Attorneys.* — So of judicial admissions by an attorney of record. Marsh *v.* Mitchell, 26 N. J. Eq. 497; Perry *v.* Simpson Manuf. Co., 40 Conn. 313; Wilson *v.* Spring, 64 Ill. 14, 18; Holderness *v.* Baker, 44 N. H. 414; Wilkins *v.* Stidger, 22 Cal. 231, 238. But an inadvertent remark in an opening may be retracted. Jannette *v.* R. R., 4 C. P. U. C. 488. See also Saunders *v.* McCarthy, 8 All. 42; The Harry, 9 Benedict, 524; Treadway *v.* R. R. Co., 40 Ia. 526.

(3) *Partners.* — So the admissions of a partner during the continuance of the partnership and within the scope of its objects are admissible against his co-partners. Henry *v.* Willard, 73 N. C. 35; Fail *v.* McArthur, 31 Ala. 26; Gavin *v.* Walker, 14 Lea, 643; Wilson *v.* McCormick, 86 Va. 995; Western, &c. Co. *v.* Towle, 65 Wis. 247; Smith *v.* Collins, 115 Mass. 388; Cady *v.* Kyle, 47 Mo. 346; Weed *v.* Kellogg, 6 McLean, 44; Munson *v.* Wickwire, 21 Conn. 513; Fickett *v.* Swift, 41 Me. 65. Whether admissions by a partner made after dissolution of the partnership, but with regard to acts done during the existence of such partnership, are admissible against the remaining partners, is a point in dispute. The weight of authority is that such statements are not admissible. Baker *v.* Stackpoole, 9 Cowen, 420, 433; Hogg *v.* Orgill, 34 Pa. St. 344; Winslow *v.* Newlan, 45 Ill. 145, 149; Daniel *v.* Nelson, 10 B. Monr. 316, 318; Dowzelot *v.* Rawlings, 58 Mo. 75; Jeffries *v.* Castleman, 75 Ala. 262; Lambeth *v.* Vawter, 6 Rob. (La.) 127. See also Van Keuren *v.* Parmelee, 2 N. Y. 523. See *contra*, 1 Greenl. Ev. § 112; Gay *v.* Bowen, 8 Metc. 100; Lefavour *v.* Yandes, 2 Blackf. 240; Parker *v.* Merrill, 6 Greenl. 41; Reimsdyk *v.* Kane, 1 Gall. 630; Loomis *v.* Loomis, 26 Vt. 198; Rich *v.* Flanders, 39 N. H. 304; Curry *v.* Kurtz, 33 Miss. 24.

(4) *Principal and Surety.* — A principal, as such, is not the agent of his surety to make admissions with regard to the surety's collateral undertaking. Chelmsford Co. *v.* Demarest, 7 Gray, 1; Hatch *v.* Elkins, 65 N. Y. 489; Respublica *v.* Davis, 3 Yeates, 128; Hotchkiss *v.* Lyon, 2 Blackf. 222; Stetson *v.* City Bank, 2 Oh. St. 167, 175; Union Savings Association *v.* Edwards, 47 Mo. 445; Griffith *v.* Turner, 4 Gill, 111; Pollard *v.* Louisville, &c. R. R., 7 Bush, 597. Conf. Music Co. *v.* Caldwell, 54 Ia. 432; Drummond *v.* Prestman, 12 Wheat. 515.

(*g*) *Admissions by Conduct.* — So-called "admissions" by assumed character, conduct, silence, and the like, are apparently not admissions in the sense of an exception to the hearsay rule. They are usually original circumstantial evidence of the facts to which they relate. West Chester, &c. R. R. *v.* McElwee, 67 Pa. St. 311; Gulerette *v.* McKinley, 27 Hun, 320; The Pizarro, 2 Wheat. 227; Winchell *v.* Edwards, 57 Ill. 41; State *v.* Kinney, 26 W. Va. 141; R. *v.* Chute, 46 Q. B. U. C. 555; State *v.* Williams, 54 Mo. 170; People *v.* Pitcher, 15 Mich. 597; State *v.* Staples, 47 N. H. 113, 119; Campbell *v.* State, 23 Ala. 44; State *v.* Reed, 62 Me. 129; Readman *v.* Conway, 126 Mass. 374. So of flight. Greenfield *v.* People, 85 N. Y. 75; State *v.* Griffin, 87 Mo. 608; State *v.* Espinozei, 20 Nev. 209; Williams *v.* State, 22 Tex. App. 497; Ross *v.* State, 74 Ala. 532. The accused can explain suspicious circumstances. State *v.* Barham, 82 Mo. 67. So of attempted bribery of witnesses. Cruikshank *v.* Gordon, 118 N. Y. 178. Or attempt to avoid arrest. Com. *v.* Brigham, 147 Mass. 414. Or concealment. Clarke *v.* State, 78 Ala. 474. Or immediate change of situation after accident. Miller *v.* Ocean Co., 118 N. Y. 199. But see Menard *v.* R. R., 150 Mass. 386, *contra*. See also Martin *v.* Towle, 59 N. H. 31. But see Heucke *v.* R. R., 69 Wis. 401; R. R. *v.* Hawthorne, 144 U. S. 202; Menard *v.* R. R., 150 Mass. 386, *contra*. Analogous to so-called "admissions by conduct" is the rule which treats as admissions by a party statements made in his presence and not denied by him; *provided* the circumstances were such as to make a denial necessary or appropriate. State *v.* Reed, 62 Me. 129, 142; Preston *v.* Amer. Linen Co., 119 Mass. 400; Corser *v.* Paul, 41 N. H. 24; Gibney *v.* Marchay, 34 N. Y. 301, 305; Churchill *v.* Fulliam, 8 Ia. 45; People *v.* Ah Yute, 54 Cal. 89; Johnson *v.* Holliday, 79 Ind. 151; State *v.* Crockett, 82 N. C. 599; Ettinger *v.* Com., 98 Pa. St. 338, 345; Loggins *v.* State, 8 Tex. Ct. App. 434, 444; Com. *v.* Funai, 146 Mass. 570; Conway *v.* State, 118 Ind. 482; Kaelin *v.* Com., 84 Ky. 354, 367; State *v.* Burton, 94 N. C. 947;

Proctor *v.* O. C. R. R., 154 Mass. 251; Bray *v.* Latham, 81 Ga. 640; Johnson *v.* Day, 78 Me. 224; Miller *v.* State, 68 Miss. 221; Tobacco Co. *v.* McElwee, 96 N. C. 71; Garrett *v.* State, 76 Ala. 18. So of statements in a letter, if such letter is replied to. Fenno *v.* Weston, 31 Vt. 345. See also Webster's case, Bemis's Report, 486. But statements made by a clergyman in course of a sermon and received in silence by the congregation are not receivable as evidence against such congregation. Johnson *v.* Trinity Church, 11 All. 123. So a person, if asleep, will not be prejudiced by statements made in his presence. Lanergan *v.* People, 39 N. Y. 39. Or if such person is intoxicated. State *v.* Perkins, 3 Hawks, 377. Or deaf. Tufts *v.* Charlestown, 4 Gray, 537. Neither does the rule apply to statements made in a letter which is not answered. St. Louis R. R. *v.* Thomas, 85 Ill. 464; Learned *v.* Tillotson, 97 N. Y. 1; Meguire *v.* Corwine, 3 MacArthur (D. C.), 81; Waring *v.* U. S. Tel. Co., 44 How. (N. Y.) Prac. 69. But not denying evidence in court is not a relevant fact. McElmurray *v.* Turner, 86 Ga. 215. Or when under arrest. State *v.* Howard, 102 Mo. 142.

(*h*) *Admissions in View of Compromise.* — The general rule seems to be that all admissions not expressly conditioned as "without prejudice," to "buy peace," or under faith of compromise, are to be admitted in evidence. 1 Greenl. Ev. § 192; Harrington *v.* Lincoln, 4 Gray, 563; Clapp *v.* Foster, 34 Vt. 580; Molyneaux *v.* Collier, 13 Ga. 406; State *v.* Bruce, 33 La. An. 186; Ashlock *v.* Linder, 50 Ill. 169. But see *contra*, Board Commissioners *v.* Verbarg, 63 Ind. 107; Daniels *v.* Woonsocket, 11 R. I. 4. Admissions of liability in the course of compromise negotiations specified to be "without prejudice" are not competent evidence. Pirie *v.* Wyld, 11 Ont. Rep. 422. But it has been held that the privilege may be lost if the real motive is not "to buy peace." Clark *v.* R. R., 29 Q. B. U. C. 136. Even where such admissions of liability are not expressly conditioned as being "without prejudice," and the like, they are inadmissible if made as a waiver of possible rights for the sake of peace. R. R. *v.* Wright, 115 Ind. 378; Montgomery *v.* Allen, 84 Mich. 656; Smith *v.* Shell, 82 Mo. 215; Kierstead *v.* Brown, 23 Neb. 595; Smith *v.* Satterlee, 130 N. Y. 677; R. R. *v.* Ragsdale, 67 Tex. 24; Home Ins. Co. *v.* Baltimore, &c. Co., 93 U. S. 527, 548; Perkins *v.* Concord R. R., 44 N. H. 223; Draper *v.* Hatfield, 124 Mass. 53; Wrege *v.* Westcott, 30 N. J. L. 212; Arthur *v.* James, 28 Pa. St. 236; Barker *v.* Bushnell, 75 Ill. 220; Richards *v.* Noyes, 44 Wis. 609; Reynolds *v.* Manning, 15 Md. 510, 526; Webber *v.* Dunn, 71 Me. 331, 340. An independent collateral fact may always be proved by admissions made in the endeavor to compromise a suit. Gerrish *v.* Sweetser, 4 Pick. 374, 377; Fuller *v.* Hampton, 5 Conn. 416, 426; Marvin *v.* Richmond, 3 Denio, 58; Plummer *v.* Currier, 52 N. H. 287; Cole *v.* Cole, 33 Me. 542; Doon *v.* Ravey, 49 Vt. 293; Ashlock *v.* Linder, 50 Ill. 169; Garner *v.* Myrick, 30 Miss. 448; Arthur *v.* James, 28 Pa. St. 236; Broschart *v.* Tuttle, 59 Conn. 1; Binford *v.* Young, 115 Ind. 174; Chaffe *v.* Mackenzie, 43 La. Ann. 1062. So the fact of an offer may be admissible. Gould *v.* Ins. Co., 134 Pa. St. 570. But see Burns *v.* Kerr, 13 Q. B. U. C. 468, *contra*. So of communications as to terms of payment. Hood *v.* Tyner, 3 Ind. App. 51. When the compromise offer is accepted, the privilege is at an end. Omnium Securities Co. *v.* Richardson, 7 Ont. Rep. 182. It has been held that the question as to whether a statement was made on the faith of a compromise, is one for the jury. Hall *v.* Brown, 58 N. H. 93.

(*i*) *Effect of Admissions.* — As to how far admissions not estoppels are treated as conclusive, see Harden *v.* Gordon, 2 Mason, 541, 561; Putnam *v.* Lewis, 8 Johns. 389; Steele *v.* Wood, 78 N. C. 365; Pillow *v.* Thomas, 57 Tenn. 120; Stowe *v.* Bishop, 58 Vt. 498; Smith *v.* Fowler, 12 Lea, 163; Cuvillier *v.* Browne, 4 U. C. Q. B. 105; Martin *v.* Algona, 40 Ia. 390; Lash *v.* Rendell, 72 Ind. 475; Perry *v.* Simpson, &c. Co., 40 Conn. 313. As to parol admissions of the contents of written documents, conf. § 215, n. 1, C. III. (*a*), *supra*. See also Loomis *v.* Wadhams, 8 Gray, 557; Crichton *v.* Smith, 34 Md. 42; Taylor *v.* Peck, 21 Gratt. 11; N. Y. Ice Co. *v.* Parker, 8 Bosw. 688; Taylor *v.* Henderson, 38 Pa. St. 60. But see Welland Co. *v.* Hathaway, 8 Wend. 480; Jameson *v.* Conway, 10 Ill. 227; Threadgill *v.* White, 10 Ired. (N. C.) L. 591. As to the now practically obsolete learning of the admissions contained in answers in equity, see Story's Eq. Pl. § 265 (*a*) and n. 1; Brandon *v.* Cabiness, 10 Ala. 155.

If an admission in the legal were always an admission in the popular sense, — *i. e.*, if

when made it were always against the real or apparent interest of the maker, — admissions would clearly have an evidentiary force *per se*. While the circumstance undoubtedly would add to the weight of such statement, it does not, apparently, constitute the ground of admissibility. An admission is not so much proof of a fact, as a *waiver* of proof. It is not so much a *probatio* as a *levamen probationis*. 1 Greenl. Ev. § 27; 2 Whar. Ev. § 1075; Buzard *v.* McAnulty, 77 Tex. 438.

Section II.

ESTOPPELS.

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§ 532. An important distinction runs through the whole subject of self-harming evidence; namely, that while in general its value is to be weighed by a jury, the law has invested some forms of it with an absolute and conclusive effect.[1] Such are technically termed "estoppels," — a doctrine, the exposition of which in all its branches belongs rather to substantive than to adjective law. Some notice of its nature, and the general principles by which it is governed, are, however, indispensable here (*k'*), and estoppels in criminal cases will be more particularly considered in the next section (*l*).

§ 533. Much misconception and prejudice have arisen from the unlucky definition or description of estoppel given by Sir Edward Coke; namely, that it is where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (*m*). If this is looked on as a definition, it violates the rules of logic, by defining by the genus, and *non*-essential difference or accident; and if as a description, which indeed Sir Edward Coke himself calls it, it is almost equally objectionable; for one would imagine from the above language that *truth* was the enemy which the law of estoppel was

(*k'*) For a consideration of the whole law of the subject, see Everest and Strode's Law of Estoppel, published in 1884.

(*l*) *Infrà*, sect. 3, sub-sect. 1.

(*m*) Co. Litt. 352 a. See also 2 Co. 4 b.

[1] For American cases on estoppel, see *infra*, p. 503.

invented to exclude. So far, however, is this from being the case, that its object is to repress fraud and harassing litigation, and to render men truthful in their dealings with each other; and there can be no question that, rightly understood and properly applied, it often produces those effects, and is a valuable auxiliary in the hands of justice. The definition given in the Termes de la Ley (*n*) is much better: "Estoppel is when one man is concluded and forbidden in law to speak against his own act or deed; yea, though it be to say the truth." Still, "forbidden to say the truth" sounds harsh; and both definitions are inadequate, as not including all the cases to which the term "estoppel" is applicable.

On the whole, an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, "Allegans contraria non est audiendus" (*o*), and is that species of præsumptio juris et de jure, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done: it is in truth a kind of argumentum ad hominem (*p*). Hence it appears that "estoppels" must not be understood as synonymous with "conclusive evidence," — the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal (*q*), or rendered conclusive on a party, either by common or statute law.

§ 534. "Estoppels," it is said by Mr. Smith in his notes to the *Duchess of Kingston's case,* are "a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common-sense and justice. . . . In our old law-books, truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. . . . However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium;* but if matters which have been once solemnly decided were to be again drawn into controversy,

(*n*) Termes de la Ley, tit. Estoppel. See to the same effect, 1 Lill. Pr. Reg. 542.

(*o*) 4 Inst. 279; Jenk. Cent. 2, Cas. 63; Broom's Max. 16, 6th Ed.

(*p*) See the judgment of the court in *Collins* v. *Martin,* 1 B. & P. 648.

(*q*) See the observations of the Barons in *Machu* v. *The London and South Western Railway Company,* 2 Exch. 415.

if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others" (*r*). "The courts have been for some time favourable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*" (*s*).

§ 535. Several rules respecting estoppels are to be found in the books. The most important are the following: 1. That estoppels must be mutual or reciprocal; *i. e.*, binding both parties (*t*). But this does not hold universally; for instance, a feoffor, donor, lessor, &c., by deed poll will be estopped by it, although there is no estoppel against the feoffee, &c. (*u*). Mr. J. W. Smith, in the work already cited (*x*), suggests that the rule will be found to apply to those cases only where *both parties* are *intended* to be bound.

§ 536. 2. In general estoppels affect only the parties and privies to the act working the estoppel; strangers are not bound by them, and cannot take advantage of them (*y*). When, however, the record of an estoppel runs to the disability or legitimation of the person, strangers shall both take the benefit of, and be concluded by, that record; as in case of outlawry, excommunication, profession, attainder of præmunire, of felony, &c. (*z*). But a record concerning the name, quality, or addition of the person has not this effect (*a*).

(*r*) 2 Smith, Lead. Cas. 801, 8th Ed. See also per curiam, in *Cuthbertson* v. *Irving*, 4 H. & N. 758.

(*s*) 2 Smith, Lead. Cas. 912, 8th Ed. Notes to *Doe* v. *Oliver*, and the *Duchess of Kingston's case*.

(*t*) Com. Dig. Estoppel, B.; Co. Litt. 352 a; Cro. Eliz. 700, pl. 16.

(*u*) Co. Litt. 47 b; 363 b.

(*x*) 2 Smith, Lead. Cas.

(*y*) Co. Litt. 352 a; Com. Dig. Estoppel, B. & C.

(*z*) Co. Litt. 352 b.

(*a*) *Id.*

§ 537. 3. It seems that conflicting estoppels neutralise each other, or, as our books express it, "Estoppel against estoppel doth put the matter at large" (*b*). Thus, if the plaintiff in an action makes title to a common by grant within time of memory, and then in another action between the same parties makes title by prescription, and the other admits this, — this last estoppel shall avoid the first estoppel, so that the plaintiff may make title to the common by prescription (*c*). So, where in a præcipe quod reddant against two, who pleaded joint tenancy with a third, the demandant said that formerly he bought a writ against one of the two, who pleaded joint tenancy with the other, whereby the writ abated; on which he purchased this writ by journeys accounts, averring that the two were sole tenants on the day of the first writ, &c., whereon the tenants vouched the third party with whom they had pleaded joint tenancy, — on its being objected that this voucher could not be received, because they had supposed him joint tenant with them, it was answered that, as the plaintiff had alleged that the defendants were sole tenants, he had ousted himself of the right to estop them from that voucher (*d*).

§ 538. Estoppels are of three kinds (*e*): 1. By matter of record; 2. By deed (*f*); 3. By matter in pais.

§ 539. 1. Estoppels by matter of record; as letters-patent, fine, recovery, pleading, &c. (*g*). The most important form of this is estoppel by judgment, which will be considered under the head of res judicata (*h*).

§ 540. With respect to estoppels by pleading. A party who does not plead within the time required by law is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one *kind* of plea, be concluded from afterwards availing himself of another. It was a well-known rule of pleading before pleas in abatement were abolished that pleas in abatement cannot be pleaded after a party has pleaded in bar, and that pleas to the jurisdiction cannot be pleaded after pleas in abatement.

(*b*) *Id.*; 2 Smith, Lead. Cas. 660, 5th Ed.; *R.* v. *Haughton*, 1 E. & B. 506, per Lord Campbell, C. J.

(*c*) 1 Roll. Abr. 874, pl. 50, citing 11 Hen. VI. 27 b, 28 a.

(*d*) Fitz. Abr. Estop. pl. 3, citing 41 Edw. III. 5, pl. 11. For other instances, see 1 Roll. Abr. 874, 875; and D'Anvers' Abridgment, Estoppel, S.

(*e*) Co. Litt. 352 a; 2 Smith, Lead. Cas. 657, 5th Ed.

(*f*) Coke (*in loc cit.*) says, "matter in writing." But it is clear that "deed" was meant: and in our old books the word "writing" is constantly used in that limited sense. See bk. 2, pt. 3, ch. 1, § 217, n. (*k*), and § 225, n. (*i*).

(*g*) Co. Litt. 352 a; Com. Dig. Estoppel A. 1; 1 Roll. Abr. 862 *et seq.*, tit. Estoppel.

(*h*) *Infrà*, ch. 9.

§ 541. As to the effect of admissions, express or implied, in pleadings, the following rule, which certainly savours of technicality, is laid down in the books; viz., that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, cannot be again litigated between the same parties, and are conclusive evidence between them, but only if the traverse is found against the party making it (*i*). But whether, and to what extent, the admitting or passing over a traversable allegation in pleading is to be deemed an admission of it for the purposes of *evidence at the trial*, is a question which has given rise to a considerable conflict of authority and opinion (*j*).

§ 542. 2. Estoppels by deed. "Nemo contra factum suum proprium venire potest" (*k*). "A deed," says Mr. Justice Blackstone (*l*), "is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything, in contradiction to what he has once so solemnly and deliberately avowed." This rule, however, must be understood to apply only where an action is brought to enforce rights arising out of the deed, and not collateral to it (*m*); and it does not include the case of a mere *general* recital in a deed, such general recital not having the effect of an estoppel (*n*). This is on the principle, "Generale nihil certum implicat" (*o*), — it being a rule that an estoppel must be certain to every intent, and is not to be taken by argument or inference (*p*); and therefore it is only a *special* recital of a particular fact in a deed which will estop (*q*). Many cases illustrative of this distinction are to be found in the reports (*r*); and the principle governing the subject has thus been laid down: "It seems clear that where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the

(*i*) Per Parke, B., in delivering the judgment of the court in *Boileau* v. *Rutlin*, 2 Exch. 665. See *Robins* v. *Lord Maidstone*, 4 Q. B. 811; Brook. Abr. Protestacion, pl. 14; and Co. Litt. 124 b.

(*j*) The following are the principal cases on this subject: *Edmunds* v. *Groves*, 2 M. & W. 642; *Bennion* v. *Davison*, 3 *Id.* 179; *Smith* v. *Martin*, 9 *Id.* 304; *Carter* v. *James*, 13 *Id.* 137; *Buckmaster* v. *Meiklejohn*, 8 Exch. 634; *Bingham* v. *Stanley*, 2 Q. B. 117; *Robins* v. *Lord Maidstone*, 4 *Id.* 811; *Bonzi* v. *Stewart*, 4 M. & Gr. 295; *Fearn* v. *Filica*, 7 *Id.* 513.

(*k*) 2 Inst. 66; Lofft, M. 322.

(*l*) 2 Blackst. Comm. 295.

(*m*) *Wiles* v. *Woodward*, 5 Exch. 557, 563.

(*n*) 32 Hen. VI. 16; 35 *Id.* 34; 2 Leon. 11, pl. 17. See the judgment in *Lainson* v. *Tremere*, 1 A. & E. 801–802.

(*o*) 2 Co. 33 b; 8 Co. 98 a.

(*p*) Co. Litt. 303 a and 352 b.

(*q*) See *Lainson* v. *Tremere*, 1 A. & E. 792; *Carpenter* v. *Buller*, 8 M. & W. 209.

(*r*) See 1 Roll. Abr. 872, Estoppel (P.); 1 Wms. Saund. 216, 6th Ed.; 3 Leon. 118, p. 168.

way of recital, shall estop the parties to aver the contrary" (*s*). Perhaps this would have been more correct if, instead of saying merely, "the parties have agreed," it had been added, "or must be taken to have agreed." When a recital is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument (*t*).

§ 543. 3. Estoppels by matter in pais. Of these, Parke, B., in delivering the judgment of the Court of Exchequer, in *Lyon* v. *Reed* (*u*), says: "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, Co. Litt. 352 a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate,* and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." But, for the reasons already stated (*v*), the courts of law in modern times, adopting a principle long known in courts of equity (*x*), have wisely extended this species of estoppel beyond its ancient limits; and although the actual decisions respecting its application in certain cases may admit of question, the following rule has been laid down by authority, and may be looked on as established. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things as existing at the same time" (*y*). It has, indeed, been said that unless the representation amounts to an agreement or licence by the party who makes it, or is understood by the party to whom it is made as amounting to that, the above rule would not apply (*z*). But it would seem that the application of the rule is not thus limited (*a*). Moreover, by "wilfully" in this rule must be understood, not that the party represents that to be true which he knows to be untrue, but

(*s*) Per Coltman, J., in delivering the judgment of the C. P. in *Young* v. *Raincock*, 7 C. B. 338; recognised and confirmed in *Stroughill* v. *Buck*, 14 Q. B. 787.

(*t*) *Stroughill* v. *Buck*, 14 Q. B. 787.

(*u*) 13 M. & W. 285, 309. See also the judgment of Tindal, C. J., in *Sanderson* v. *Collman*, 4 Man. & Gr. 209.

(*v*) *Supra*, § 534.

(*x*) 1 Fonbl. Eq. bk. 1, ch. 3, sect. 4, 3rd Ed.

(*y*) *Pickard* v. *Sears*, 6 A. & E. 469, 474; *Freeman* v. *Cooke*, 2 Exch. 633, 654; *Howard* v. *Hudson*, 2 E. & B. 1; *Clarke* v. *Hart*, 6 Ho. Lo. Cas. 633, 644, 655–656, 669; *Cornish* v. *Abington*, 4 H. & N. 549; *Gregg* v. *Wells*, 10 A. & E. 90.

(*z*) *Freeman* v. *Cooke*, 2 Exch. 654, 664; *Clarke* v. *Hart*, 6 Ho. Lo. Cas. 633, 644, 656; *Cornish* v. *Abington*, 4 H. & N. 549, 555.

(*a*) See per Lord Selborne, C., *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (in Dom. Proc.), L. Rep., 6 Ap. Ca. 352, 360.

only that he *means* his representation to be acted upon, and that it is acted upon accordingly. For if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take his representation to be true, and believe that it was meant that he should act upon it; and the party to whom it was made does act upon it as true, — the party making the representation will be equally precluded from contesting its truth (*b*). And conduct, by negligence or omission, where a duty is cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, where a retiring partner omits to inform his customers, in the usual mode, of the *fact* that the continuing partners are no longer authorised to act as his agents, he is bound by all contracts made by them with third persons, on the faith of their being so authorised (*c*).

§ 544. It has been made a question, whether estoppels in pais can be *pleaded;* the objection being that to plead matter in pais by way of estoppel is a violation of the rule of pleading, which prohibits the putting on the record any matter of evidence, however conclusive. But the point having been expressly raised on demurrer to a replication, in a case of *Sanderson* v. *Collman* (*d*), was unanimously overruled by the Court of Common Pleas. Tindal, C. J., there said: "If we find upon the record a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. If by the last branch is meant only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined. . . . Lord Coke, speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury." And Coltman, J., adds, "The meaning of the rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be *inferred*. . . . I think that if a party has a legal defence to that which is set up against him, he cannot be precluded from pleading such defence." There is, however, this great distinction between estoppels by record or by deed

(*b*) *Freeman* v. *Cooke*, 2 Exch. 654, 663; *Howard* v. *Hudson*, 2 E. & B. 1; *Cornish* v. *Abington*, 4 H. & N. 549, 555; *White* v. *Greenish*, 11 C. B. N. S. 209, 230.

(*c*) *Freeman* v. *Cooke*, 2 Exch. 654, 663. See also *The Western Bank of Scotland* v. *Needell*, 1 F. & F. 461.

(*d*) *Sanderson* v. *Collman*, 4 Man. & Gr. 209. See *Hallifax* v. *Lyle*, 3 Exch. 446.

and estoppels in pais; namely, that the former must, in order to make them binding, be pleaded, *if there be an opportunity*, otherwise the party omitting to plead the estoppel waives it, and leaves the issue at large, on which the jury may find according to the truth; while with respect to estoppels in pais, they need not, at least in most cases, be pleaded in order to make them obligatory (*e*). Thus, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he had made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract (*f*). This distinction is said not to be recognised in America (*g*); and it has been objected to on the ground that it appears inconsistent that the principle of the authority of res judicata should govern the decision of a *court*, when the matter is referred to them by pleading the estoppel, but that a *jury* should be at liberty to disregard this principle altogether; and that the operation of such an important principle as that of res judicata should depend upon the technical forms of pleading in particular actions (*h*). But the distinction is not without reason. Where a party intends to conclude another by an estoppel, he ought to give him an opportunity of deliberately replying to it, and not spring it upon him at nisi prius. With due notice, the adversary might be able to show that the matter relied on as an estoppel was not such in reality, as not relating to the property or transaction in controversy; or if it were, that its effect had been removed by matter subsequent, as, for instance, that the party pleading the estoppel had, by some other proceeding, concluded himself from taking the objection, — estoppel against estoppel setting the matter at large (*i*); or when the estoppel relied on is a judgment, that that judgment had been reversed on error, or deprived of binding force by an Act of Parliament, &c. The wilfully keeping back an estoppel is not only evidence of unfair dealing and a desire to surprise, but to divest it of its conclusive effect, is a just punishment on the party who has unnecessarily called the jury together, and wantonly occasioned the expense of a trial. It may be asked, why then are estoppels by matter in pais conclusive on the jury, seeing that they may be pleaded? That is probably a remnant of the old notion that matters in pais were matters of notoriety to the jury coming de vicineto (*k*), who therefore ought not to be required to find against

(*e*) *Freeman* v. *Cooke*, 2 Exch. 654, 662; 1 Wms. Saund. 325 a, n. (*d*), 6th Ed.; *Treviban or Trevivan* v. *Lawrence*, 2 Lord Raym. 1036 and 1048; 1 Salk. 276; *Magrath* v. *Hardy*, 4 Bing. N. C. 782; *Lord Feversham* v. *Emerson*, 11 Exch. 385.

(*f*) *Freeman* v. *Cooke*, 2 Exch. 654, 662.

(*g*) 1 Greenl. Ev. § 531, 7th Ed.

(*h*) Ph. & Am. Ev. 512.

(*i*) *Suprà*, § 537.

(*k*) See *suprà*, § 543.

their personal knowledge; whereas deeds and judgments are dead proofs (*l*); the former of which were supposed to lie in the peculiar knowledge of the witnesses, and the latter being on record in the courts.

§ 545. Before dismissing the subject of estoppel, we would direct attention to the question whether the maxim of the *civil* law, "Allegans suam turpitudinem (or suum crimen) non est audiendus," is, or ever was, a maxim of the *common* law. Littleton (*m*) puts the following case: "If a man be disseised, and the disseisor maketh a feoffment to divers persons to his use, and the disseisor continually taketh the profits, &c., and the disseisee release to him all actions reals, and after he sueth against him a writ of entry in nature of an assize, by reason of the statute, because he taketh the profits, &c. Quære, how the disseisor shall be aided by the said release; for if he will plead the release generally, then the demandant may say that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c., by his acknowledgment of the disseisin, &c. But peradventure by special pleading he may bar him of the action which he sueth, &c., though the demandant may enter." Sir Edward Coke (*n*), in commenting on the words "he must acknowledge a disseisin," gives the following case: "In a writ of dower the tenant pleaded, that before the writ purchased A. was seised of the land, &c., until by the tenant himself he was disseised, and that hanging the writ A. recovered against him, &c.; judgment of the writ, and adjudged a good plea, in which the tenant confessed a disseisin in himself." For this is cited 15 Edw. IV. 4 B. (*o*), and correctly, except that instead of "recovered against him," it should be "re-entered upon him." There are some other cases in the Year Books to the same effect. Thus, in the 5 Edw. IV. 5 B. pl. 23, in a præcipe quod reddat, the tenant showed that long before the writ purchased, one H. was seised until disseised by him, and that H. entered hanging the writ, judgment of the writ, and adjudged good plea as was said; the reporter, however, adding, "Sed non interfui." And in the case already cited from the 15 Edw. IV., Littleton himself is reported to have put this case, which, however, goes much beyond the others: "If I disseise P. and levy a fine to you, and then P. enters upon you, and enfeoffs me, and you enter on me, and I bring an assize, and you plead the fine in bar, I may avoid the fine by the matter aforesaid, so a man may take advantage of his wrong done

(*l*) Bk. 1, pt. 2, § 119
(*m*) Sect. 499.
(*n*) Co. Litt. 287 a.
(*o*) Pl. 7.

by himself, &c." But, on the other hand, Sir Edward Coke either forgot these authorities and the passage in his own first Institute, or he supposed some distinction between pleading and evidence as to the principle in question; for in the 4th Inst. 279, when speaking of witnesses, he lays down the maxim in its terms, "Allegans suam turpitudinem non est audiendus," but only cites for it a case of *Rich. de Raynham*, in the C. P. in 13 Edw. I. But in *Collins* v. *Blantern* (*p*), in 1767, which has become a leading case (*q*), it was held that, to an action on a bond, the defendant may plead that it was given by him for an illegal and corrupt consideration. In *Lutterell* v. *Reynell* (*r*), T. 29 Car. II., which was an action of trespass for taking money on its being excepted against the plaintiff's evidence, that if it were true it destroyed the plaintiff's action, inasmuch as it amounted to prove the defendant guilty of felony, — it was, says the reporter, "agreed that it should not lie in the mouth of the party to say that himself was a thief, and therefore not guilty of the trespass." On the trial of Titus Oates for perjury in 1685 (*s*), the court rejected the testimony of a person who came to swear that he had, by persuasion of the defendant, perjured himself on a former occasion, — Lord Chief Justice Jefferies pronouncing such evidence to be "very nauseous and fulsome in a court of justice." So on the trial of Elizabeth Canning for perjury, in 1754 (*t*), on the question being raised, Legge, B., said, "I believe witnesses have very often been called that have declared they have been perjured in other instances; but I will never admit or suffer a person that will say they have been perjured in another affair, and I knew it before they were sent for. When she (*i. e.*, the witness) swears true, I cannot tell; but that she has sworn false once, I must know." On counsel observing that in the case of subornation of perjury, such were admitted every day, Legge, B., answered, "They are admitted, but it goes so much to their credit." The recorder (Moreton) expressed a similar opinion, and referred to the case of *Titus Oates*. It is very difficult indeed to see a distinction in this respect between perjury and subornation, — why an avowal of perjury on a former occasion should be an objection to competency in the one case, and only to credit in the other. The maxim in question was cited by Lord Mansfield as a maxim of the civil law, in *Walton* v. *Shelley* (*u*), in 1786, which case was afterwards overruled (*v*). It has likewise been referred to in some other cases (*w*); but the decisions in such of them as can be supported

(*p*) 2 Wils. 341.

(*q*) See that case and the note to it, 1 Smith, L. C. 387, 8th Ed.

(*r*) 1 Mod. 282.

(*s*) 10 How. St. Tr. 1079, 1185, 1186.

(*t*) 19 How. St. Tr. 283, 632, 633.

(*u*) 1 T. R. 296, 300.

(*v*) *Jordaine* v. *Lashbrook*, 7 T. R. 601.

(*w*) *Findon* v. *Parker*, 7 Jur. 903, 907; *Steadman* v. *Duhamel*, 1 C. B. 888, 889; *Mann* v. *Swann*, 14 Johns. 269, 273; *U. S.* v. *Leffler*, 11 Pet. 86 & 94.

would stand very well without it, — most, if not all, proceeding on the unimpeachable principle that a man shall not be allowed to take advantage of his own guilt, wrong, or fraud (*x*).

§ 546. The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law that a witness, although not always bound to *answer* them, may be *asked* questions tending to criminate, injure, or degrade him (*y*). So it is the constant practice in criminal cases to receive the evidence of accomplices, who depose to their own guilt as well as to that of the accused; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence (*z*). The cases of *Titus Oates* and *Elizabeth Canning,* the chief authorities in favour of the maxim, were expressly overruled by the Court of King's Bench in *R.* v. *Teal* (*a*). That was a prosecution against Thomas Teal, Hannah S., and others for conspiring falsely to charge the prosecutor with being the father of a bastard child of Hannah S. A nolle prosequi having been entered as to Hannah S., she was examined as a witness to prove that she had, at the instigation of the defendant Teal, forsworn herself in deposing that the prosecutor was father of the child. A new trial being moved for on the ground that she was an incompetent witness, the cases of *Oates* and *Channing* were relied on; and it was also argued that a person who admits himself to be an infidel is disqualified from giving evidence. The court, however, took a different view; and Lord Ellenborough said: "An infidel cannot admit the obligation of an oath at all, and cannot therefore give evidence under the sanction of it. But though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would be no warrant for the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide." In the subsequent case also of *Rands* v. *Thomas* (*b*), which was an action for goods furnished to a ship, the plaintiff, in order to show the defendant to be a part-owner, proved that his name was upon the register as such, and also that after the time when the goods were furnished, he had executed a bill of sale of his share to one Cooke; on whose oath the register was obtained, and he was

(*x*) *Infrà.*
(*y*) Bk. 2, pt. 1, ch. 1.
(*z*) Bk. 2, pt. 1, ch. 2, § 171.
(*a*) 11 East, 307.
(*b*) 5 M. & S. 244.

stated in it to be a part-owner. The defendant proposed to call Cooke, to prove that he had inserted the defendant's name in the register without his privity or consent; on which it was objected that Cooke could not contradict the oath he had taken at the time of the registry. Graham, B., acceded to this view, and rejected the evidence; but the court set aside the verdict on the authority of *R.* v. *Teal*, holding that the objection went only to the credit of the witness. So it is competent for a defendant who is sued on a contract to plead and prove that, as between him and the plaintiff, such contract was illegal or immoral (*c*); but not that it was merely fraudulent (*d*). For although a man may, in a court of justice, acknowledge his own wrong or fraud, it is a principle of law that he shall not be allowed to take advantage of it (*e*), — "Nullus commodum capere potest de injuriâ suâ propriâ" (*f*).

Section III.

SELF-HARMING STATEMENTS IN CRIMINAL CASES.

§ 547. We come lastly to self-harming statements in criminal cases; or, as they are most usually termed, "confessions." In treating this subject, we propose to consider, —

1. Estoppels in criminal cases.
2. The admissibility and effect of extra-judicial, self-criminative statements.
3. Infirmative hypotheses affecting self-criminative evidence.

Sub-Section I.

ESTOPPELS IN CRIMINAL CASES.

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§ 548. In this branch of the law there are, for obviously just reasons, few estoppels. The first and most important is the estoppel

(*c*) *Holman* v. *Johnson*, Cowp. 341, 343.

(*d*) *Jones* v. *Yates*, 9 B. & C. 532, 538.

(*e*) 1 Blackst. Comm. 443; Co. Litt. 148 b; 2 Inst. 713; *Montefiori* v. *Montefiori*, 1 W. Bl. 363; *Doe* d. *Roberts* v. *Roberts*, 2 B. & A. 367; *Doe* d. *Bryan* v. *Bancks*, 4 *Id.* 401, 409, per Best, J.; *Daly* v. *Thompson*, 10 M. & W. 309; *Findon* v. *Parker*, 11 *Id.* 675, 681; *Murray* v. *Mann*, 2 Exch. 538.

(*f*) Co. Litt. 148 b; Jenk. Cent. 4, Cas. 5; Broom's Maxims, 6th Ed. 273. See Dig. lib. 50, tit. 17, l. 134.

by judicial confession. It may be taken as a rule of universal jurisprudence that a confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to condemn or acquit him, is sufficient to found a conviction (*g*), even where it may be followed by sentence of death; such confession being deliberately made under the deepest solemnities, oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge (*h*). "Confessus in judicio pro judicato habetur, et quodammodo suâ sententiâ damnatur" (*i*). "Confessio facta in judicio, omni probatione major est" (*j*). "Confessio in judicio, est plena probatio" (*k*). Still, if the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity (*l*), the court ought not to receive it. So if the offence charged is one of the class denominated "facti permanentis," and no other indication of a corpus delicti can be found (*m*). The numerous instances which have occurred of the falsity of confessions, judicial as well as extra-judicial (*n*), traces of which are visible very early in our legal history (*o*), fully justify this course. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused that such plea will not entitle him either to mercy or a mitigated sentence, and freely offering him leave to retract it and plead not guilty (*p*). For it is important to observe that the plea of not guilty by an accused person is not to be understood as a moral asseveration of his innocence of the offence with which he is charged; it means no more than that he avails himself of the undoubted right vested in him by law, of calling on the prosecution to prove him guilty of that offence.

§ 549. 2. An accused person must plead the different kinds of pleas in their regular order,— by pleading in bar he loses his right to plead in abatement, &c. (*q*).

§ 550. 3. An accused person may be estopped by various collateral matters which do not appear on record. Thus he cannot challenge a

(*g*) 1 Greenl. Ev. § 216, 7th Ed.; Tayl. Ev. § 792, 4th Ed.; Dig. lib. 42, tit. 2; Cod. lib. 7, tit. 59; Mascard. de Prob. Concl. 344, 345; Ayliffe, Parerg. Jur. Can. Angl. 545; 2 Hagg. C. R. 315; 1 Ev. Poth. § 798.

(*h*) Greenl. *in loc. cit.*

(*i*) 11 Co. 30 a; Acc. Cod. lib. 7, tit. 59; Dig. lib. 42, tit. 2, l. 1; *Id.* lib. 9, tit. 2, l. 25, § 2.

(*j*) Jenk. Cent. 2, Cas. 99.

(*k*) Jenk. Cent. 3, Cas. 73.

(*l*) Finch's Law, 29; Ayliffe, Parerg. Jur. Can. Angl. 545.

(*m*) See *suprà*, ch. 2, sect. 3, sub-sect. 2, § 441.

(*n*) See *infrà*, sub-sect. 3.

(*o*) 27 Ass. pl. 40; 22 Ass. pl. 71.

(*p*) 2 Hale, P. C. 225.

(*q*) 2 Hale, P. C. 175; *Cook's case*, 5 How. St. Tr. 1143.

juror after he has been sworn (*r*), unless it be for cause arising afterwards (*s*). If he challenges a juror for cause, he must show all his causes together (*t*); and on a trial for high treason, if he means to object to a witness, that he is misdescribed in the list of witnesses delivered under the 7 Ann. c. 21, and 6 Geo. IV. c. 50, he must take the objection on the voir dire; for it comes too late after the witness has been sworn in chief (*u*). In the case of *R.* v. *Frost* (*v*), which was an indictment for high treason, where the list of witnesses required by those statutes was not delivered in the manner therein prescribed, — *i. e.*, simultaneously with the copy of the indictment and jury panel, — it was held, on a case reserved, by nine judges against six, that the objection came too late, after the jury had been sworn and the indictment opened to them.

(*r*) 2 Hale, P. C. 293.
(*s*) Hob. 235.
(*t*) 2 Hale, P. C. 274.
(*u*) *R.* v. *Frost*, 9 C. & P. 129, 183.
(*v*) 9 C. & P. 162 and 187.

AMERICAN NOTES.

(§ 532) ESTOPPEL. — (*a*) *Reason of Rule.* — Modern public policy as applied to the law of evidence differs from that of the past not so much in the end to be gained by exclusions as in the means. It admits the witness, but excludes portions of his evidence. Witnesses are usually competent; much relevant evidence is not. Such rules are open to the objection that refusal to hear evidence is quite as clumsy as refusing to hear a witness. 1 Greenl. Ev. §§ 22, 23, n., 27, 204–210; 4 Kent's Comm. 261, n.; Jones *v.* Sasser, 1 Dev. & Bat. (N. C.) 452, 464; Blake *v.* Tucker, 12 Vt. 39, 44; Pelletreau *v.* Jackson, 11 Wend. 110, 117; Mills *v.* Graves, 38 Ill. 455; McAfferty *v.* Conover, 7 Oh. St. 99.

(*b*) *Species of Estoppel.* — As stated in the text, estoppels are usually divided into (1) estoppels by record, (2) estoppels by deed, and (3) estoppels by matter of fact, or in pais.

(1) (2) *Estoppels by Record and by Deed.* — Estoppels by record and by deed are, generally speaking, parts of the substantive law. Conf. § 43, n. 1, *supra*. For example, the estoppel raised by the use of various pleas belongs to the law of pleading. 1 Greenl. Ev. §§ 27, 205; Beach *v.* Jeffery, 1 Ill. Ct. of App. 283; McCreery *v.* Everding, 54 Cal. 168; Thayer *v.* Arnold, 32 Mich. 336; Summerlin *v.* Livingston, 15 La. An. 519; Wheeler *v.* Ruckman, 2 Abb. Prac. N. S. 186; Kingsbury *v.* Buchanan, 11 Ia. 387. As to the so-called estoppel of judgment, see § 588, n. 1, C. II., *infra*. So rules regulating the conclusive effect upon the parties and privies thereto of the recitals in a deed come properly under the law of real property. Bigelow on Estoppel, 301–321; 1 Greenl. Ev. §§ 23–26; 2 Whar. Ev. §§ 1039–1043; Johnson *v.* Thompson, 129 Mass. 398; Girard *v.* Bradstreet, 4 Rev. Lég. 376; Smith *v.* Graham, 34 Mich. 302; Shevlin *v.* Whelen, 41 Wis. 88; Carver *v.* Jackson, 4 Pet. 1, 83; Millard *v.* McMullin, 68 N. Y. 345; Glasgow *v.* Baker, 72 Mo. 441; Smith *v.* Penny, 44 Cal. 161; Gouldsmith *v.* Coleman, 57 Ga. 425; Manuf. Co. *v.* Elizabeth, 42 N. J. L. 249; Noble *v.* Cope, 50 Pa. St. 17; Polk *v.* Chaison, 72 Tex. 500. That a recital of consideration received is not conclusive, see McCrea *v.* Purmort, 16 Wend. 460; Barter *v.* Greenleaf, 65 Me. 405; Irvine *v.* McKeon, 23 Cal. 472; Miller *v.* Goodwin, 8 Gray, 542. But see McMullin *v.* Glass, 27 Pa. St. 151. That such an estoppel binds the State, as well as private parties or privies, see Com. *v.* André, 3 Pick. 224; Branson *v.* Worth, 17 Wall. 32, 42. So of title by estoppel; for various aspects of which see Bigelow on Estoppel, 322, *et seq.*; Forster *v.* Forster, 129 Mass. 559; House *v.* McCormick, 57 N. Y. 310;

Brown *v.* Phillips, 40 Mich. 264; Hart *v.* Gregg, 32 Oh. St. 502; Smith *v.* De Russy, 29 N. J. Eq. 407; Frey *v.* Ramsour, 66 N. C. 466; Bachelder *v.* Lovely, 69 Me. 33; Jacksonville, &c. R. R. Co. *v.* Cox, 91 Ill. 500. So of a release of dower: the releasor is estopped from setting up any claim for dower in the premises granted. Farley *v.* Eller, 29 Ind. 322; Usher *v.* Richardson, 29 Me. 415; Stearns *v.* Swift, 8 Pick. 532. See Butchers' Association *v.* Boston, 139 Mass. 290.

(3) *Estoppel in Pais, or by Conduct.* — Wherever one person, either intentionally or with gross negligence, by statement or conduct, causes or allows another person to believe a certain fact or facts to be true, it will not be permitted to the person first mentioned to deny the truth of such fact or facts in any suit between such persons or their representatives in legal interest. Bigelow on Estoppel, 485, *et seq.*; Redd *v.* Muscogee R. R. Co., 48 Ga. 102; Stevens *v.* Dennett, 51 N. H. 324; Nixon *v.* Carco, 28 Miss. 414; Rose *v.* Mayor, &c. of Baltimore, 51 Md. 256; Sweezey *v.* Collins, 40 Ia. 540; N. Y. Rubber Co. *v.* Rothery, 107 N. Y. 310; Rorer Iron Co. *v.* Trout, 83 Va. 397; Gruichard *v.* Brande, 57 Wis. 534; Bynum *v.* Preston, 69 Tex. 287; Bond *v.* Terrell Mfg. Co., 82 Tex. 309; Williams *v.* King, Draper (Can.) Rep. 452; Martin *v.* Righter, 10 N. J. Eq. 510; Hawley *v.* Middlebrook, 28 Conn. 527; Stone *v.* Britton, 22 Ala. 543; Williams *v.* Jackson, 28 Ind. 334; Forsyth *v.* Day, 46 Me. 176; Jewell *v.* Paper Co., 101 Ill. 57; Kirk *v.* Hartman, 63 Pa. St. 97; Rice *v.* Bunce, 49 Mo. 231; Manufacturers' Bank *v.* Hazard, 30 N. Y. 226; Jackson *v.* Allen, 120 Mass. 64, 79. Conf. Stephen Dig. Ev., art. 102. *Provided*, (1) that the party claiming such estoppel or his predecessor in legal interest was expected to act upon such representation, and did in point of fact so act, without negligence or bad faith. Andrews *v.* Lyons, 11 All. 349; Muller *v.* Pondir, 55 N. Y. 325; Davis *v.* Smith, 43 Vt. 269, 276; Mut. Life Ins. Co. *v.* Norris, 31 N. J. Eq. 583; McCune *v.* McMichael, 29 Ga. 312; Wilson *v.* Castro, 31 Cal. 420; Crossan *v.* May, 68 Ind. 242; Graves *v.* Blondell, 70 Me. 190; Tower *v.* Haslam, 85 Me. 86; Tousley *v.* Board of Education, 39 Minn. 419; Chellis *v.* Coble, 37 Kans. 558; Mitchell *v.* Amador Co., 75 Cal. 464; Griffith *v.* Wright, 6 Col. 248; Wortham *v.* Thompson, 81 Tex. 348; Mining Co. *v.* Woodmas, 12 Col. 46; Gooding *v.* Underwood, 89 Mich. 187; Morgan *v.* Farrel, 58 Conn. 413; Wilds *v.* Attix, 4 Del. Ch. 253; Swager *v.* Lehman, 63 Wis. 399; Mayer *v.* Erhardt, 88 Ill. 452; Hazelton *v.* Batchelder, 44 N. H. 40; Darrah *v.* Bryant, 56 Pa. St. 69. See also Horn *v.* Cole, 51 N. H. 287; Brightman *v.* Hicks, 108 Mass. 246. And *provided*, (2) that such party is or may be prejudiced by the denial. 1 Greenl. Ev. § 22, n.; Kirkpatrick *v.* Brown, 59 Ga. 450, 453; Payne *v.* Burnham, 62 N. Y. 69; Nourse *v.* Nourse, 116 Mass. 101; Security Ins. Co. *v.* Fay, 22 Mich. 467; Williams *v.* Chandler, 25 Tex. 4; Hawkins *v.* Methodist Church, 23 Minn. 256; Turnipseed *v.* Hudson, 50 Miss. 429; Tucker *v.* Conwell, 67 Ill. 552; Allum *v.* Perry, 68 Me. 232; McCabe *v.* Raney, 32 Ind. 309; Rosebrough *v.* Ansley, 35 Oh. St. 107; McKnight *v.* Pittsburgh, 91 Pa. St. 273; Reynolds *v.* Adden, 136 U. S. 348; R. *v.* Chesley, 16 Can. Supreme Ct. 306, 319. Whether in case neighbors agree on a false line, either is estopped to set up the true line is in dispute. That there is such an estoppel, see Perry *v.* Patterson, 15 New Bruns. 367. But see Butchers' Assoc'n *v.* Boston, 139 Mass. 290; Schraeder Mining Co. *v.* Packer, 129 U. S. 688. For this reason a parol admission not acted on may be contradicted. Baker *v.* Ins. Co., 43 N. Y. 283; Peck *v.* Vandenberg, 30 Cal. 11, 22; Lapping *v.* Duffy, 65 Ind. 229. But see *contra*, Teutonia Ins. Co. *v.* Anderson, 77 Ill. 384. If acted on, such admissions may estop. Armour *v.* R. R. Co., 65 N. Y. 111; Miller *v.* Sullivan, 26 Oh. St. 639; Carr *v.* Miner, 42 Ill. 179; Dewey *v.* Field, 4 Metc. 381; Dresback *v.* Minnis, 45 Cal. 223; Gaff *v.* Harding, 66 Ill. 61. See also Kuhl *v.* Jersey City, 8 C. E. Green, 84; Bullard *v.* Hascall, 25 Mich. 132. So where the owner of property allows another to act as owner, to the threatened injury of innocent purchasers, such owner will be estopped from setting up his title to such property. Kirk *v.* Hamilton, 102 Mass. 68; Gill *v.* Hardin, 48 Ark. 409; Wood's Appeal, 92 Pa. St. 379; Stewart *v.* Munford, 91 Ill. 58; Chapman *v.* Pingree, 67 Me. 198; Angell *v.* Johnson, 51 Ia. 625; Redman *v.* Graham, 80 N. C. 231; Winton *v.* Hart, 39 Conn. 16; McLean *v.* Dow, 42 Wis. 610; Evans *v.* Snyder, 64 Mo. 516. See also Hardigree *v.* Mitchum, 51 Ala. 151; Hayes *v.* Livingston, 34 Mich. 384; Howland *v.* Woodruff, 60 N. Y. 73. That the representation must have regard to a past or present fact, see Jackson *v.* Allen, 120 Mass. 64, 79; White *v.* Ashton, 51 N. Y. 280; Ins. Co. *v.*

Mowry, 96 U. S. 544; Keating *v.* Orne, 77 Pa. St. 89; Bennett *v.* Dean, 41 Mich. 42. See also Soward *v.* Johnson, 65 Mo. 102; Mojarrieta *v.* Saenz, 80 N. Y. 547.

Estoppel by conduct arises from matter of fact, attaches to the moral quality of an act, and resembles rather a principle than a rule. That such estoppel may arise from silence or non-intervention, see Morgan *v.* R. R. Co., 96 U. S. 716, 720; Davenport R. R. *v.* Gas Co., 43 Ia. 301; More *v.* Ins. Co., 130 N. Y. 537; Nicholas *v.* Austin, 82 Va. 817; Hackett *v.* Bailey, 86 Ill. 74; Adams *v.* Fite, 59 Tenn. 69, Studdard *v.* Lemmond, 48 Ga. 100; New Haven *v.* R. R., 38 Conn. 422; Mihills Manuf. Co. *v.* Camp, 49 Wis. 130. But see Hodges *v.* Spicer, 79 N. C. 223; Inst. for Savings *v.* Littlefield, 6 Cush. 210; Viele *v.* Judson, 82 N. Y. 32. Estoppel in pais has been called "equitable estoppel." It is, however, fully recognized at law. Copper Mining Co. *v.* Ormsby, 47 Vt. 709. But see also Wimmer *v.* Ficklin, 14 Bush, 193.

(c) *Part of Substantive Law.* — Like other estoppels, many so-called estoppels in pais are best regarded, not as examples of a rule of evidence, but simply as a short method of saying that to permit inquiry into certain matters would contravene a rule of positive law. Thus, for example, the rule supposed to estop the acceptor of a bill of exchange from denying the signature of the drawer is part of the law of negotiable paper. Byles, Bills, *202; 2 Greenl. Ev. §§ 164, 165; McKleroy *v.* Southern Bank, 14 La. Ann. 458; Bank of U. S. *v.* Bank of Georgia, 10 Wheat. 333; Levy *v.* Bank of U. S., 1 Binn. 27; National Park Bank *v.* Ninth Nat. Bank, 46 N. Y. 77; Hoffman *v.* Bank of Milwaukee, 12 Wall. 181. See also Nat. Bank of North America *v.* Bangs, 106 Mass. 441; Story, Prom. Notes, §§ 135, 387; Ross *v.* Dixie, 7 U. C. 414. That he may dispute the genuineness of an indorsement, even that of the payee, see Canal Bank *v.* Bank of Albany, 1 Hill, 287; Williams *v.* Drexel, 14 Md. 566. See also Hortsman *v.* Henshaw, 11 How. 177; Meacher *v.* Fort, 3 Hill (S. C.), 227; Burgess *v.* Bank, 4 Bush, 600. So also the effect of check certification as grounding an estoppel is part of the law of banking. Irving Bank *v.* Wetherald, 36 N. Y. 335; Mussey *v.* Eagle Bank, 9 Metc. 306; Merchants' Bank *v.* State Bank, 10 Wall. 604. In like manner, the rule that a bailee or other agent is estopped to deny the title of his bailor or principal is matter of positive law. 1 Greenl. Ev. § 207; Osgood *v.* Nichols, 5 Gray, 420; Dezell *v.* Odell, 3 Hill (N. Y.), 215; Lund *v.* Seaman's Bank, 37 Barb. 129; The Idaho, 93 U. S. 575; Dresbach *v.* Minnis, 45 Cal. 223; Staples *v.* Fillmore, 43 Conn. 510; Lindner *v.* Brock, 40 Mich. 618, 621. So the rule forbidding a tenant, his legal representatives and successors, to deny during the continuance of the lease the title of the landlord at time of the demise, is part of the law of landlord and tenant. 1 Greenl. Ev. § 25; Blake *v.* Sanderson, 1 Gray, 332; Stott *v.* Rutherford, 92 U. S. 107; Hatch *v.* Bullock, 57 N. H. 15; Hawes *v.* Shaw, 100 Mass. 187; Territt *v.* Cowenhaven, 79 N. Y. 400; Betts *v.* Wurth, 32 N. J. Eq. 82; Nims *v.* Sherman, 43 Mich. 45; Morrison *v.* Bassett, 26 Minn. 235. But the tenant may show that the landlord's title has since expired. Presstman *v.* Silljacks, 52 Md. 647; St. John *v.* Quitzow, 72 Ill. 334; Ryder *v.* Mansell, 66 Me. 167; Clarke *v.* Clarke, 51 Ala. 498. See also Page *v.* Kinsman, 43 N. H. 328. That the estoppel of a tenant applies to one in possession of land under a license from another, see Hamilton Co. *v.* Cincinnati, &c. R. R. Co., 29 Oh. St. 341; Glynn *v.* George, 20 N. H. 114. See also Wilson *v.* Maltby, 59 N. Y. 126. So the conclusive nature of a bill of lading is most satisfactorily considered as part of the law of carriers. 1 Greenl. Ev. § 305; Angell on Carriers, (5th Ed.), § 231, n.; Relyea *v.* New Haven, &c. Co., 42 Conn. 577; Witzler *v.* Collins, 70 Me. 290; Hastings *v.* Pepper, 11 Pick. 41, 43; Nelson *v.* Woodruff, 1 Black, 156. So the statement that one is estopped, in the absence of fraud, from asserting that he has not read documents signed by him, seems equivalent to saying that by a rule of positive law such a failure is not a ground of exemption from legal liability. Ware *v.* Starkey, 80 Va. 191.

With regard to the conclusive effect of judicial admissions, see § 519, n. 1 (*f*), (2), *supra*. Conf. also 1 Greenl. Ev. §§ 204–210; Henderson *v.* Reeves, 6 Blackf. 101; Huntington *v.* Amer. Bank, 6 Pick. 340; Hoffaring *v.* Grove, 42 Barb. 548; Elwood *v.* Lannon's Lessee, 27 Md. 200; Carradine *v.* Carradine, 33 Miss. 698. For the estoppel of a license of patents and the like, see Kinsman *v.* Parkhurst, 18 How. 289; Jackson *v.* Allen, 120 Mass. 64, 79. See also Saxon *v.* Dodge, 57 Barb. 84; Faulks *v.* Kamp, 17 Blatch. 432.

(*d*) *Need not be Pleaded.*— At common law an estoppel in pais need not be pleaded. Coleman *v.* Pearce, 26 Minn. 123; Hawley *v.* Middlebrook, 28 Conn. 527; Mayer *v.* Ramsey, 46 Tex. 371; Turnipseed *v.* Hudson, 50 Miss. 429, 435. See also Phila. &c. R. R. Co. *v.* Howard, 13 How. 307, 335; McCormick *v.* Keith, 8 Brown (Neb.), 142. For statutory modifications of this rule, see Phillipps *v.* Van Schaick, 37 Ia. 229; Warder *v.* Baldwin, 51 Wis. 450; Wood *v.* Ostram, 29 Ind. 177. See also Dale *v.* Turner, 34 Mich. 405.

Sub-Section II.

THE ADMISSIBILITY AND EFFECT OF EXTRA-JUDICIAL, SELF-CRIMINATIVE STATEMENTS.

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§ 551. Self-harming evidence is not always receivable in criminal cases as it is in civil.[1] There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it *voluntarily*, or at least *freely*. It is an established principle of English law that every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment; or which has been made after any inducement to confess has been held out to the accused, by or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect, the inducement thus held out must be in the nature of a promise of favour or threat of punishment; *i. e.*, it must be calculated to convey to the mind of the accused that his condition, so far as it may be affected by the charge made against him, will be rendered better or worse by his consenting or refusing to confess. If, therefore, it appears that the accused was urged to speak the truth on moral grounds only (*x*), the confession or criminative statement will be receivable; as it also will be, when the supposed influence of an illegal inducement to confess may fairly be presumed to have been dissipated before the confession by a warning from a person in authority not to pay any attention to it (*y*). The cases on the subject of what is an illegal inducement to confess, are very numerous, and

(*x*) See *R.* v. *Jarvis*, L. Rep., 1 C. C. 96; *R.* v. *Reeve*, *Id.* 362; *R.* v. *Gilham*, 1 Moo. C. C. 186; *R.* v. *Wild*, *Id.* 452.

(*y*) The 11 & 12 Vict. c. 42, s. 18, gives a form of caution, to be given by justices of the peace to persons brought before them

[1] For American cases on confessions, see *infra*, p. 526.

far from consistent with each other (*z*); and there can be little doubt that the salutary rule which excludes confessions unlawfully obtained, has been applied to the rejection of many not coming within its principle (*a*), although judges are now less disposed than they formerly were to hold that the language used amounts even to an inducement (*b*). All questions relating to the admissibility of extra-judicial confessorial statements are of course to be decided by the judge. Where, on a confession being offered in evidence, it appeared that an illegal inducement to confess had been held out, but the answers of the witness were confused and contradictory as to whether that was before or after the confession, Parke, B., rejected it, saying that the onus of proving that the confession was *not* made in consequence of an improper inducement lay on the prosecution; and as it was impossible to collect from the answers of the witness whether such was the case or not, the confession could not be received (*c*).

§ 552. With respect to the effect of extra-judicial confessions or statements when received, the rule is clear that, unless otherwise directed by statute, no such confession or statement, whether plenary or not plenary, whether made before a justice of the peace, or other tribunal having only an inquisitorial jurisdiction in the matter, or made by deed, or matter in pais, either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it.

§ 553. The necessity for clear and unequivocal proof of a corpus delicti (*d*), joined to the desire so strongly evinced by our law, to protect parties from being unfairly prejudiced by false or hasty statements, gave rise to the doubt whether a conviction can be supported on the mere extra-judicial, self-criminative statement of an accused person (*e*). Modern authorities incline to the affirmative (*f*). Still, such a principle should be acted on with great caution; for the

charged with offences; and so does the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 13, sub-sect. 2 re-enacting in substance the repealed 18 & 19 Vict. c. 126, s. 3.

(*z*) See *R.* v. *Baldry*, 2 Den. C. C. 430.

(*a*) See per Kelly, L. C. B., *R.* v. *Reeve*, L. Rep., 1 C. C. 362, 363; *R.* v. *Baldry*, 2 Den. C. C. 430.

(*b*) Stephen on Evidence, p. 29.

(*c*) *R.* v. *Warringham*, 15 Jur. 318; 2 Den. C. C. 430, 447, note.

(*d*) See *suprà*, ch. 2, sect. 3, sub-sect. 2, § 441.

(*e*) Matth. de Prob, cap. 1, n. 7; *R.* v. *Eldridge*, R. & R. 440; *R.* v. *White*, *Id.* 508.

(*f*) *R.* v. *Falkner*, R. & R. 481; *R.* v. *Tippett*, *Id.* 509; *R.* v. *Wheeling*, 1 Leach, C. L. 311, note. In the United States considerable difference of opinion seems to prevail on this subject. See 1 Greenl. Ev. § 217, 7th Ed.; Wharton, Americ. Crim. Law, 313, 3rd Ed.; Burrill, Circ. Ev. 498.

numerous cases in which persons have wrongly accused themselves, or wrongly acknowledged themselves guilty of crimes, ought to render tribunals very careful of inflicting punishment when the only proof of crime rests on the statement of the supposed criminal. On capital charges, and charges of murder especially, a double degree of caution is requisite: the truth of the statement should be carefully sifted, and every effort made to obtain evidence to confirm or disprove the corpus delicti. These considerations apply with increased force when a confession is not plenary.

Sub-Section III.

INFIRMATIVE HYPOTHESES AFFECTING SELF-CRIMINATIVE EVIDENCE.

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§ 554. The infirmative hypotheses affecting self-criminative evidence deserve the deepest and most anxious attention. The professors of the civil law, on the revival of its study in Europe, attributed a peculiar virtue to the confessions of parties. It was pronounced a species of proof of so clear, excellent, and transcendent a nature as to admit of no proof to the contrary (*g*). In a great degree connected

(*g*) "Multum à doctoribus rei confessio. Probatio dicitur liquidissima, principalissima, illustrissima, adeò ut non admittat probationem in contrarium." Matth. de Prob. cap. 1, n. 6. They also called it "probatio probatissima." Bonnier, Traité des Preuves, § 241. It would, however, be most unjust to charge this absurdity on the Ro-

with this notion was the practice of torturing suspected persons to extract confessions (*h*), — which, to the disgrace of the civil law in all its modifications (*i*), and likewise of the canon law (*j*), so long prevailed on the continent. The absurdity, to say nothing of the injustice and cruelty of that practice, has been too ably and too frequently exposed to require notice here (*k*) : its almost universal abandonment in our days is perhaps its severest condemnation. The fallacy also of attributing a conclusive effect to confessorial evidence was detected by the intelligence of later times (*l*), and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true ? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature — self-preservation — may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning is, however, more plausible than sound. Conceding that every man will act as he deems best for his own interest, still (besides the possibility of his misconceiving facts or law), he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from

man law itself, which in express terms lays down : " Si quis ultrò de maleficio fateatur, non semper ei fides habenda sit : nonnunquam enim aut metû, aut quâ aliâ de causâ in se confitentur." Dig. lib. 48, tit. 18, l. 1, § 27, where a strong instance of false confession is recorded. So in another place. " Si quis hominem vivum falso confiteatur occidisse, et postea paratus sit ostendere hominem vivum esse : Julianus scribit, cessare Aquiliam ; quamvis confessus sit se occidisse ; hoc enim solum remittere actori confessoriam actionem, ne necesse habeat docere, eum occidisse : cæterum occisum esse hominem à quocunque oportet." Dig. lib. 9, tit. 2, l. 23, s. 11. " Hoc apertiùs est circa vulneratum hominem : nam si confessus sit vulnerasse, nec sit vulneratus, æstimationem cujus vulneris faciemus ? vel ad quod tempus recurremus ? " *Id.* l. 24. " Proinde is occisus quidem non sit, mortuus autem sit, magis est, ut non teneatur in mortuo, licet fassus sit." *Id.* l. 25. See also Dig. lib. 48, tit. 18, l. 1, § 17 ; tit. 19, l. 27 ; lib. 11, tit. 1, l. 11, §§ 8 *et seq.* ; lib. 42, tit. 2.

(*h*) Bonnier, Traité des Preuves, 647.

(*i*) Introd. pt. 2, §§ 69, 70, n. (*l*).

(*j*) Decret. Gratian. pars 2, causa 5, quæst. 5, cap. 4 ; Constit. Clement. lib. 6, tit. 3, cap. 1, § 1.

(*k*) The civilians professed to found all their labours on the Roman law. We have seen in note (*g*) how grievously they departed from it in one instance, and others might be adduced. On the subject of torture, indeed, they copied their original more faithfully ; and yet it would be difficult to find a stronger exposition of the absurdity and danger of the practice than in the following language of the Digest itself : " Quæstioni fidem non semper, nec tamen nunquam habendam, Constitutionibus declaratur : etenim res est fragilis, et periculosa, et quæ veritatem fallat. Nam plerique patientiâ sive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo possit : alii tantâ sunt impatientiâ, ut (in) quovis mentiri, quàm pati tormenta velint : ita fit, ut etiam vario modo fateantur, ut non tantùm se, verum etiam alios comminentur." Dig. lib. 48, tit. 18, l. 1, § 23. Notwithstanding all this, the compilers of the Digest retained the practice of torture in the Roman law, and the cases in which it might be resorted to are carefully pointed out in the same title, and stand side by side with the above passage.

(*l*) The later civilians were fully sensible of this fallacy. See Mascard. de Prob. quæst. 7 ; Matth. de Prob. cap. 1, nn. 4 and 6 ; 1 Hagg. C. R. 304.

the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give place to the stronger; and consequently, that a false confessorial statement may be expected when the party sees a motive sufficient, in his judgment, to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment denounced by law against offences is visible to all mankind, not only are the motives which induce a person to avow delinquency confined to his own breast, but those who hear the confessorial statement often know little or nothing of the confessionalist, far less of the innumerable links by which he may be bound to others who do not appear on the judicial stage. The force of these considerations will be better appreciated when we come to examine separately the principal motives to false confessions (*m*); but first, as connected with the whole subject, must be noted a marked distinction between our judicature and that of most foreign nations.

§ 555. In the mediæval tribunals of the civil and canon laws, the *inquisitorial* principle was essentially dominant. And this has so far survived that in many continental tribunals at the present day, every criminal trial commences with a rigorous interrogation of the accused, by the judge or other presiding officer. Nor is this interrogation usually conducted with fairness towards the accused. Facts are garbled or misrepresented; questions assuming his guilt are not only put, but pressed and repeated in various shapes; and hardly any means are left untried to compel him, either directly or by implication, to avow something to his prejudice. This is no chimerical danger. By artful questioning and working on their feelings, weak-minded individuals can be made to confess or impliedly admit almost anything; and to resist continued importunities to acknowledge even falsehood requires a mind of more than average firmness (*n*).

(*m*) *Infrà*.

(*n*) Look at the trial, if *trial* it can be called, of C. Silanus before the Emperor Tiberius. "Multa aggerebantur etiam insontibus periculosa . . . non temperante Tiberio quin premeret voce, vultu, eò quòd ipse creberrimè interrogabat; neque refellere aut eludere dabatur; ac sæpe etiam confitendum erat, ne frustrà quæsivisset." Tacitus, Annal. lib. 3, cap. 67. A good instance is to be found in the trial of the Duc de Praslin, in 1847, which, having taken place before the Chamber of Peers, at that time the highest tribunal in France, may fairly be supposed to have been conducted with the strictest regularity. The duke was charged with the murder of his wife, and the following is part of his interrogation by the president: —

"Was she (the deceased) not stretched upon the floor where you had struck her for the last time?" — "Why do you ask me such a question?"

Then follow these questions and answers.

"You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?" — "Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me."

"You are very wretched to have committed this crime?" — (The accused makes no answer, but appears absorbed.)

"Have you not received bad advice, which impelled you to this crime?" — "I

The common law of England proceeds in a way quite the reverse of all this, — holding that the onus of proving the guilt of the accused lies on the accuser, and that no person is bound to criminate himself, according to the maxim, "Nemo tenetur seipsum prodere" (*o*). It has therefore always abstained from physical torture, — "Cruciatus legibus invisi" (*p*), — and taken great care, perhaps too great care, to prevent suspected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements (*q*); and it not only prohibits judicial interrogation in the first instance, but if the evidence against the accused fails in establishing a primâ facie case against him, it will not even call on him for his defence. As, however, the introduction of judicial interrogation into this country has been warmly advocated by able jurists (*r*), we propose to examine briefly the claims of the conflicting systems.

§ 556. In favour of judicial interrogation it is argued, first, that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them; and as the accused must necessarily best know his own guilt or innocence, he is natu-

have received no advice. People do not give advice on such a subject."

"Are you not devoured with remorse, and would it not be a sort of solace to you to have told the truth?" — "Strength completely fails me to-day."

"You are constantly talking of your weakness. I have just now asked you to answer me simply 'yes,' or 'no.'" — "If anybody would feel my pulse, he might judge of my weakness."

"Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that." — (The accused makes no reply.)

"Your silence answers for you that you are guilty." — "You have come here with a conviction that I am guilty, and I cannot change it."

"You can change it if you give us any reason to believe the contrary; if you will give any explanation of appearances that are inexplicable upon any other supposition than that of your guilt." — "I do not believe I can change that conviction on your mind."

"Why do you believe that you cannot change that conviction?" — (The accused, after a short silence, said that he had not strength to continue.)

"When you committed this frightful crime did you think of your children?" — "As to the crime, I have not committed it; as to my children, they are the subject of my constant thoughts."

"Do you venture to affirm that you have not committed this crime?" — (The accused, putting his head between his hands, remained silent for some moments, and then said), "I cannot answer such a question." (11 Jur. 365, pt. 2.)

(*o*) 3 Bulst. 50. See also pt. 2, ch. xi., *post*.

(*p*) Lofft, M. 434. Whenever torture has been applied in England, it was in virtue of some real or imaginary prerogative of the crown; for it could not be awarded in the ordinary course of law. The "peine, or prisone, forte et dure" may seem an exception to this, but in truth is not; for the object of it was to compel the accused to *plead*, — *i. e.*, say whether he was guilty or not, — in order that the court might know whether they ought to proceed to sentence, or empanel a jury to try him.

(*q*) See *suprà*, sub-sect. 2, § 551. We speak of the *ordinary* practice of our tribunals; not of the state trials of former times, where every rule seems to have been reversed.

(*r*) Particularly Bentham. See his Judicial Evidence, bk. 2, ch. 9; bk. 5, ch. 7; bk. 9, pt. 4, cc. 2, 3, 4; and pt. 5, ch. 3, &c. See also a paper by the present Mr. Justice Stephen when at the bar; Papers of the Juridical Society, vol. i. p. 456.

rally the fittest person to be interrogated on that subject; and indeed that in many cases, often of the most serious nature, it would be impossible, without his own testimony, to prove crime against the accused. Secondly, that the rule which excuses a man from criminating himself is a protection to none but the evil-disposed; for not only have innocent persons nothing to dread from interrogation, however severe, but the more closely the interrogation is followed up, the more their innocence will become apparent. And, lastly, that in declining to extract self-harming statements from the accused himself, while it receives without scruple, from the mouths of witnesses, similar statements which he has made to them, the English law violates its own fundamental rule, which requires the best evidence to be given.

§ 557. Before considering what may be directly urged on the other side, it is essential to point attention to an important circumstance commonly lost sight of. In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a *general* interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a *question* to him, whereby he is required either to prove that the fact deposed to is false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, his non-explanation of apparently criminating circumstances always tells most strongly against a prisoner. What our law prohibits is the *special* interrogation of the accused, — the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis. And here a question naturally presents itself, — supposing the interrogation of accused persons advisable, by whom is it to be performed? There seems but two alternatives, — the accuser or the court; and if the extraction of truth be the *sole* object in view, why is not the accused to be interrogated on oath like other witnesses? But this and the subjecting the accused to the interrogation of the accuser, although sometimes advocated, is not the continental practice, where the interrogation of the accused is the act of the tribunal. And here a difficulty presents itself at the outset, — how is an abuse of power in this respect to be rectified? Improper questions put to a witness by a party or his counsel may be objected to by the other side, and the judge determines whether the objection is well founded. But when the judge is the delinquent, who is to call him to order? Decency and the rules of practice alike prohibit counsel from taking exception

to questions put by the bench; and, indeed, the doing so would be appealing to a man against himself.

§ 558. But to test this important question by broader principles. First, then, the functions of tribunals appointed to determine causes are primarily and essentially *judicial*, not *inquisitorial*. The tribunal is to judge and decide; to supply the proofs — the materials for decision — belongs in general to the litigant parties, though the inquisitorial principle is recognised thus far, that the tribunal is empowered to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld. In the next place, the proposition that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them must be understood with these limitations: first, that those means be such as are likely to extract the truth in the majority of cases; and, secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract (*s*). Admitting, therefore, that the *special* interrogation of accused persons might in some cases extract truth which otherwise would remain undiscovered (indeed, the same may be said of torture, duress of imprisonment, or any other violent means adopted to compel confessions), the law is fully justified in rejecting the use of such an engine, if on the whole prejudicial to the administration of justice. Now, that sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused, — a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practised criminal has a much better chance of victory than an innocent person, embarrassed by the novelty and peril of his situation; whose honesty would probably prevent his attempting a suppression of truth, however much to his prejudice; and whose inexperience in the ways of crime, were he in a moment of terror to resort to it, would insure his detection and ruin. But where the judge is dishonest or prejudiced, the danger increases immeasurably. The screw afforded by judicial interrogation would then supply a ready mode of compelling obnoxious persons, under penalty of condemnation for silence, to disclose their most private affairs; and corrupt governments would be induced, in order to get at the secrets of political enemies, or sweep them away by penal condemnation, to place unprincipled men on the bench, thus pollut-

(*s*) See Introd. pt. 2.

ing justice at its source. In short, judicial interrogation, however plausible in theory, would be found in practice a *moral torture*, scarcely less dangerous than the physical torture of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.

§ 559. To return to the subject of false self-criminative statements. It is sometimes impossible to ascertain the motive which has led to a confession indisputably false. In November, 1580, a man was convicted and executed, on his own confession, for the murder, near Paris, of a widow who was missing at the time, but who two years afterwards returned to her home (*t*). And the celebrated case of Joan Parry and her two sons — who were executed in this country in the seventeenth century, for the murder of a man named Harrison who re-appeared some years afterwards — affords another instance. That conviction proceeded chiefly on the confession of one of the accused; whether the result of insanity, fear, improper inducements to confess, or the desire of revenge against his fellow-prisoners, it is difficult to determine (*u*).

§ 560. All false self-criminative statements are divisible into two classes, — those which are the result of MISTAKE on the part of the confessionalist, and those which are made by him in expectation of BENEFIT. And the former are twofold, — mistakes of *fact* and mistakes of *law*.

§ 561. First, of mistakes of *fact*. A man may believe himself guilty of a crime either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators. A case has been cited in a former part of this work (*x*), where a girl died in convulsions while her father was in the act of chastising her very severely for theft, and he fully believed that she died of the beating; but it afterwards turned out that she had taken poison on finding her crime detected. If the surgeon had not made a post-mortem examination, that man would have been indicted for homicide, and most probably would have pleaded guilty to manslaughter, at least. Instances frequently occur, where death from previously existing disease follows shortly after the unjustifiable

(*t*) Bonnier, Traité des Preuves, § 256. This seems the case referred to in Matth. de Prob. cap. 1, n. 4.

(*u*) 14 How. St. Tr. 1312. See also the false confession by John Sharpe of the murder of Catharine Elmes, Ann. Reg. for 1833, Chron. 74.

(*x*) *Suprà*, ch 2, § 447; Beck's Med. Jurisp. 766.

infliction of wounds or blows, believed by the guilty party to have been fatal (*y*). So a man may mistake for a robber a corpse which has been secretly conveyed into his chamber, may inflict blows or wounds on it, and discovering the mistake, consider himself guilty of homicide (*z*). A habitual thief may, by confounding one of his exploits with another, suppose and admit himself guilty of an offence in which he really bore no part (*a*), although it must be acknowledged that justice is not likely to suffer much from this. Under the present head may be classed some of the confessions of witchcraft that will be noticed presently (*b*).

§ 562. 2. Next, as to mistakes of *law*. It should never be forgotten that all confessions avowing delinquency in general terms are, more or less, *confessiones juris;* and this will in a great degree explain what to unreflecting minds seems so anomalous, — the caution exercised by British judges in receiving a plea of guilty (*c*). The same observation of course applies to all extra-judicial statements which are not mere relations of facts. And here one great cause of error is ignorance of the meaning of forensic terms (*d*); especially where the accused, conscious of *moral*, is unaware that he has not incurred *legal* guilt. Thus, a man really guilty of fraud or larceny might plead guilty to a charge of robbery, through ignorance that, in legal signification, the latter means a taking of property accompanied with violence to the person, though it is popularly used to designate any act of barefaced dishonesty. This is a mistake which formerly might have cost a man his life; and to this hour a person really guilty of manslaughter might, through ignorance, plead guilty of the capital offence of murder. Again, the distinction between larceny and aggravated trespass is sometimes very slight; so that an ignorant man, conscious that he cannot defend his right to property which he has taken, might plead guilty to a charge of larceny, where there had been no animus furandi.

§ 563. In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some *real or supposed benefit*. It is obviously impossible to enumerate the motives which may sway the minds

(*y*) See Taylor's Med. Jurisp. ch. 29, 7th Ed.

(*z*) See the story of the little Hunchback in the Arabian Nights' Entertainments.

(*a*) 3 Benth. Jud. Ev. 157, 158.

(*b*) *Infrà.*

(*c*) *Suprà*, sub-sect. 1, § 548.

(*d*) 27 Ass. pl. 40. A woman was arraigned for having feloniously stolen some bread, who said that she did it by command of her husband. And the justices through pity would not take her acknowledgment, but took the enquest, by which it was found that she did it by coercion of her husband against her will, whereupon she went quit, &c.

of men to make false statements of this kind (*e*). First, many are made for ease, and to avoid vexation arising out of the charge; and in some of these cases the cause of the false statement is apparent; viz., when it is made to escape torture, either physical or moral (*f*). In others, it is less obvious. Weak or timorous persons, confounded at finding themselves in the power of the law, or alarmed at the testimony of false witnesses, or the circumstantial evidence against them, or distrustful of the honesty or capacity of their judges, hope by an avowal of guilt to obtain leniency at their hands (*g*).

§ 564. Moreover, an innocent man, accused or suspected of a crime, may deem himself exposed to annoyance at the hands of some person, to whom his suffering as for that crime would be acceptable (*h*). To this class belong those cases where the evidence necessary to establish the innocence of the confessionalist would be the means of disclosing transactions which it was the interest of many to conceal; or would bring before the world, in the character of a criminal, some eminent individual, whose reward for a false acknowledgment of guilt would be great, and whose vengeance for exposure might be terrible. Under circumstances like these, the

(*e*) See Benth. Jud. Ev. bk. 5, ch. 6, sects. 2 and 3.

(*f*) See *supra*, §§ 554 *et seq.*

(*g*) A striking instance of this is afforded by the case of the two Boorns, who were convicted in the Supreme Court of Vermont, in Bennington County, in September term, 1819, of the murder of Russell Colvin, May 10, 1812. It appeared that Colvin, who was the brother in-law of the prisoners, was a person of a weak and not perfectly sound mind; that he was considered burdensome to the family of the prisoners, who were obliged to support him; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time that he had been murdered; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided; but in 1819, one of the neighbours having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to the death and the concealment of the remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket knife of Colvin, and a button of his clothes, were found in an old open cellar in the same field; and in a hollow stump, not many rods from it, were discovered two nails and a number of bones believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised by some misjudging friends that, as they would certainly be convicted upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. Ev. § 214, n. (2), 7th Ed.

(*h*) 3 Benth. Jud. Ev. 124.

accused is induced by threats or bribes to suppress the defence, and own himself the author of the crime imputed to him.[1]

§ 565. But false self-criminative statements also arise from objects wholly collateral, relating either to the party himself or to others. 1. With respect to the first of these. 1. A false confession of an offence may be made with the view of stifling inquiry into other matters; as, for instance, some more serious offence of which the confessionalist is as yet unsuspected (*i*).

§ 566. 2. The most fantastic shape of this anomaly springs from the state of mental unsoundness which is known by the name of *tædium vitæ* (*k*). Several instances are to be found, where persons tired of life have falsely accused themselves of *capital* crimes, which were either purely fictitious, or were committed by others (*l*). In such cases the maxim of the continental lawyers, "Nemo auditur perire volens" (*m*), may be applied with advantage.

§ 567. 3. "In the relation between the sexes," says Bentham, when treating of the subject of false confessions (*n*), "may be found the source of the most natural exemplifications of this, as of so many other eccentric flights. The female unmarried, — punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married, — the like imputation, even though unmerited, invited with a view to marriage, through divorce." And so sensible was the canon law of this country of the danger of false confessions from this source that, as we have seen, it would not allow adultery to be proved (at least for the purpose of divorce à vinculo matrimonii) by the unsupported confession, judicial or extra-judicial, of the wife (*o*). In this country, however, the divorce

(*i*) 3 Benth. Jud. Ev. 124.

(*k*) See Bacon's Essay on Death; Dig. lib. 29, tit. 5, l. 1, § 23; Matth. de Crim. ad lib. 48 Dig. tit. 16, cap. 1, n. 2.

(*l*) A Frenchman named Hubert was convicted and executed, on a most circumstantial confession of his having occasioned the great fire of London in 1666; "although," adds the historian, "neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch weary of life, and chose to part with it in that way." Continuation of Lord Clarendon's Life, 352, 353.

(*m*) Bonnier, Traité des Preuves, §§ 256 and 257; D'Aguesseau (Œuvres), tom. 4, p. 186; 5 Causes Célèbres, 454, Ed. Richer; Matth. *in loc. cit.*

(*n*) 3 Benth. Jud. Ev. 116, 117.

(*o*) *Suprà*, § 441. And see the Canons of 1597, cap. 6, and of 1604, cap. 105. Also the judgment of Sir William Scott in *Mortimer* v. *Mortimer*, 2 Hagg. C. R. 316; Gibs. Cod. Jur. Eccl. Angl. tit. 22, cap. 17. and Ought. Ordo Jud. tit. 213.

[1] For some additional cases, see Whar. Crim. Ev. § 634, and notes.

court will dissolve a marriage upon the unequivocal admissions of the wife, although not supported by other evidence if all reasonable ground for suspicion be removed after looking at the evidence with all distrust and vigilance (*o'*). But although the wife's admissions are receivable in evidence against herself, they are not so receivable against the person with whom she alleges she committed adultery; and the strange result may follow that the judge (or jury if the case be tried with a jury) may find that the wife has committed adultery with him, but that he has not committed adultery with her (*o''*).

§ 568. 4. "Vanity," observes the jurist above quoted (*p*), "without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. False confessions, from the same motive, are equally within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man; I wrote such or such a party pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth; I wrote such or such a religious tract, defending opinions regarded as heretical by the Established Church, regarded as orthodox by my sect." False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally.

§ 569. 5. Instances may be found of false confessions made with a view to some specific collateral end (*r*). The Amalekite who falsely accused himself of having slain Saul presents an early and authentic instance (*s*). Soldiers engaged on foreign service not

(*o'*) *Robinson* v. *Robinson*, 1 Sw. & Tr. 393; 29 L. J. P. M. & A. 179; but in this case no decree was made, the court not being satisfied that the extracts from the diaries of the wife, which were relied on for the petitioner, amounted to a confession of adultery. See also *Williams* v. *Williams*, L. R. 1 P. & D. 29; in which case the co-respondent also had confessed.

(*o''*) See *Robinson* v. *Robinson*, *supra*, followed in *Crawford* v. *Crawford*, 11 P. D. 150, where Butt, J., found that the respondent had committed adultery with the co-respondent, but that there was no admissible evidence that the co-respondent had committed adultery with the respondent.

(*p*) 3 Benth. Jud. Ev. 117, 118.

(*r*) Under this head comes the celebrated case of the slave Primitivus, who, to escape from his master, falsely accused himself and others of homicide. Dig. lib. 48, tit. 18, l. 1, § 27.

(*s*) 2 Sam i.

unfrequently declare themselves guilty of having committed crimes at home, in order that, by being sent back to take their trial, they may escape from military duty (*t*). Formerly, when transportation was looked upon by many of the lower orders as a boon rather than a punishment, offences were occasionally committed in the hope of procuring the supposed benefit; and it is not improbable that false confessions of offences which had been really committed by others were made with the same object. And whether from such morbid love of notoriety, or mere weak-mindedness, or a love of mischief, it is almost invariably the case that murders of a specially horrible kind — as, for instance, the Whitechapel murders of prostitutes in 1888 and 1889 — are followed by a series of false confessions. It is perhaps to be regretted that the authors of such confessions are not amenable to that criminal law the administrations of which they tend to hamper.

§ 570. 2. Hitherto we have been considering cases where the false confession is made with the view of benefiting the confessionalist himself. We now proceed to those in which other parties are involved. 1. The strongest illustrations of this are where the person who makes the false confession is desirous of *benefiting* others; as, for instance, to save the life, fortune, or reputation of, or to avert suffering from, a party whose interests are dearer to him than his own. A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provisions secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold, through excitement and grief at witnessing the death of her friend (*u*). A case is also mentioned where, after a serious robbery had been committed, a man drew suspicion of it on himself, and when examined before a magistrate dropped hints amounting to a constructive admission of his guilt, in order that his brothers, who were the real criminals, might have time to escape; and afterwards, on his trial, the previous object having been attained, proved himself innocent by a complete alibi (*v*). It is well known that persons have sometimes destroyed themselves with the view of benefiting their families. The less exalted motive of getting money has sometimes had the same effect (*x*).

(*t*) False confessions of *desertion* are so common that a special clause (s. 26) respecting them is inserted in Army Act, 1881.

(*u*) Case of *Maria Schoning* and *Anna Harlin*, Causes Célèbres Etrangères, vol. 1, p. 200, Paris, 1827.

(*v*) 1 Chit. Crim. Law, 85.

(*x*) After the publication of the third edition of his work, the author received a letter on this subject from Mr. T. T. Meadows, British Consul at Newchwang, Northern China, to the effect that in China the personation of criminals, and that in

§ 571. 2. The desire of *injuring* others has occasionally led to the like consequence. Persons reckless of their own fate have sought to work the ruin of their enemies by making false confessions of crimes and describing them as participators. We shall feel little surprise at this when we recollect how often persons have inflicted grievous wounds on themselves, and even in some instances, it is said, committed suicide, in order to bring down suspicion of intended or actual murder on detested individuals (*y*).

§ 572. The anomaly of false confession is not confined to cases where there might have been a criminal, or corpus delicti. Instances are to be found in the judicial histories of most countries where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognised as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits, which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offences, with the minutest details of time and place, but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated murders and other heinous crimes (*z*). The cases in Scotland are even more monstrous than those in England (*a*); but there is strong reason to believe that in most of them the confession was obtained by torture (*b*); and the following sensible solution of the psychological phenomenon which they all present, is given by an

cases involving capital punishment, is a well-known fact. "The inducement," observes Mr. Meadows, "is not always money. Juniors in families have been known to personate their criminal seniors, and even domestic slaves or serfs their guilty masters to whom they were attached." The custom supplies the chief incident in Mr. James Payn's novel "By Proxy."

(*y*) See bk. 2, pt. 2, § 206.

(*z*) See the cases of *Mary Smith*, 2 How. St. Tr. 1049; and of the *Three Deron Witches*, 8 How. St. Tr. 1017; the note to the case of the *Bury St. Edmond's Witches*, 6 How. St. Tr. 647; and the case of the *Essex Witches*, 4 How. St. Tr. 817, the latter especially. The confessions of Anne Cate, 4 How. St. Tr. 856, of Rebecca West, *Id.* 840, of Rose Hallybread, *Id.* 852, of Joyce Boanes, *Id.* 853, and of Rebecca Jones, *Id.* 854, are among the most remarkable; the first two of which are set out in the Appendix to this work, No. II.

(*a*) A large number of these are collected in Arnot's Collection of Celebrated Criminal Trials in Scotland, pp. 347, *et seq.*, Edinb. 1785; and in Pitcairn's "Criminal Trials in Scotland," Edinb. 1833, tit. "Witchcraft," in the General Index. See in particular the case of Isobel Elliot, Sept. 13, 1678, who, with *nine others, judicially confessed to have been baptised by the devil, and to have had carnal copulation with him.* They were all convicted and burnt. (Arnot, 360, 361.) A similar confession was made by Issobell Gowdie, 13 April, 1662; Pitcairn, vol. 4, p. 602. See also the case of *Bessie Dunlop, Id.* vol. 2, p. 49.

(*b*) For a full description of the instruments of torture used for this purpose, see Pitcairn, vol. 2, pp. 50, 375, 376.

eminent writer on the criminal law of the former country (*c*): "All these circumstances duly considered, — the present misery, the long confinement, the small hope of acquittal, the risk of a new charge and prosecution, and the certain loss of all comfort and condition in society, — there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of party. Add to these motives, though of themselves sufficient, the influence of another, as powerful perhaps as any of them, — the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times, when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, and of the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who, either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a communication with evil spirits, by the means which in those days were reputed to be effectual for such a purpose. And it is possible that among these there might be some who, in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered to mistake their own dreams and ravings or hysteric affections for the actual interviews and impressions of Satan." The following case is reported as having occurred in India in 1830. Three prisoners were made to confess before the police to having, by means of sorcery, held forcible connection with the wife of the prosecutor, then in the tenth month of her pregnancy, beat or otherwise ill-treated her, and afterwards taken the child out of her womb, and introduced into it, in lieu thereof, the skin of a calf and an earthen pot, in consequence of which she died. These confessions were corroborated by the discovery in the womb of the deceased of an earthen pot and a piece of calf's skin; but the prisoners were acquitted, principally on the ground that the earthen pot was of a size that rendered it impossible to credit its introduction during life (*d*).

§ 573. The above causes affect, more or less, every species of confessorial evidence. But *extra-judicial*, confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses, which are sometimes overlooked in practice. These are *mendacity* in the report, *misinterpretation* of the language used, and *incompleteness* of the statement (*e*). 1. "Mendacity." The supposed confessorial statement may be either wholly or in part a fabrication of the deposing witnesses. And here it should not be forgotten that,

(*c*) Hume's Crim. Law of Scotland, vol. 1, p. 591.

(*d*) *Kutti* v. *Chatapan and others*, Arbuthnot, Reports of the Foujdaree Udalut of Madras, 20.

(*e*) 3 Benth. Jud. Ev. 113.

of all sorts of evidence, that which we are now considering is the most easy to fabricate, and however false, the most difficult to confront and expose by any sort of counter-evidence, direct or circumstantial (*f*). 2. "Misinterpretation." No act or word of man, however innocent or even laudable, is exempt from this. *E. g.*, a paper in the handwriting of the accused is found in his possession, in which he is spoken of as guilty of the offence imputed to him. This is consistent with his guilt; but on the other hand, that paper may be a libel on him, which the accused has kept with a view of refuting the libel, or of bringing the libeller to justice (*g*). Again, entirely fallacious conclusions may be drawn from language uttered in jest, or by way of bravado (*h*); as where a man wrote to his friend, who was summoned as a juror on a trial which excited much public attention, conjuring him to convict the defendant, guilty or innocent (*i*). But equally unfounded inferences are sometimes drawn from words supposed to be confessorial, but which were used with reference to an act not identical with the subject of accusation or suspicion; as where a man who has robbed or beaten another, hearing that he has since died, utters an exclamation of regret for having ill-treated him. In the case of a female accused of adultery, part of the proof was a self-disserving statement in these words, "I am very unhappy; for God's sake, hide my faults; those who know not what I suffered, will blame my conduct very much." "Am I," said Lord Stowell, commenting on this, "placed in such a situation by this evidence as to say that it must necessarily refer to adultery? She has been detected in imprudent visits, — it might allude to them" (*k*). But of all the causes which lead to the misinterpretation of the language used by suspected persons, the greatest are the haste and eagerness of witnesses, and the love of the marvellous, so natural to the human mind, by which people are frequently prompted to mistake expressions, as well as to imagine or exaggerate facts, especially where the

(*f*) Foster's Cr. Law, 243; 4 Blackst. Comm. 357; 1 Greenl. Evid. § 214, 7th Ed.

(*g*) 3 Benth. Jud. Ev. 114.

(*h*) The unfortunate result of the case of Richard Coleman at the Kingston Spring Assizes of 1749 was partly, if not chiefly, owing to this cause. A woman had been brutally assaulted by three men, and died from the injuries she received. It appeared that at the time of the commission of the outrage one of the offenders called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. Coleman, who was in a public house intoxicated, was asked by a person there, with the view of ensnaring him, if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes, I was; and what then?" or according to another account, "If I was, what then?" On this and some other circumstances he was convicted and executed, but the real criminals were afterwards discovered. Two of them were executed, confessing their guilt, the third having been admitted to give evidence for the Crown. Wills, Circ. Evid. 67 & 71, 3rd Ed.

(*i*) 3 Benth. Jud. Ev. 115.

(*k*) *Williams* v. *Williams*, 1 Hagg. C. R. 304.

crime is either very atrocious or very peculiar (*l*). 3. The remaining cause of error in confessorial evidence of this nature is "incompleteness;" *i. e.*, where words, though not misunderstood in themselves, convey a false impression for want of some explanation which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost in consequence of the deafness or inattention of the hearers. "Ill hearing makes ill rehearsing," said our ancestors. Expressions may have been forgotten or unheeded in consequence of witnesses not being aware of their importance; *e. g.*, a man suspected of larceny acknowledges that he took the goods against the will of the owner, adding that he did so because he thought they were his own. Many a bystander, ignorant that this latter circumstance constitutes a legal defence, would remember only the first part of the statement.

§ 574. Before dismissing the subject of self-disserving evidence in criminal cases, it remains to advert to the force and effect of "non-responsion," or silence under accusation, "evasive responsion," and "false responsion." First, then, with respect to "non-responsion." When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it. We have already alluded to the fallacy of the assumption that silence is in all respects tantamount to confession (*m*); and however strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. The party, owing to deafness or other cause, may not have heard the question or observation, or even if he has, may not have understood it as conveying an imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his *momentary* silence may be caused by impediment of utterance, or a feeling of surprise at the imputation (*n*). 3. When this kind of evidence is in an extra-judicial form, the transaction comes to the tribunal

(*l*) See *suprà*, ch. 1, § 295; and note to *Earle* v. *Picken*, 5 C. & P. 542. A remarkable instance of this is presented in the case of *R.* v. *Simons*, 6 C. & P. 540. The prisoner was indicted for the then capital offence of having set fire to a barn; and a witness was called to prove that, as the prisoner was leaving the magistrate's room after his committal, he was overheard to say to his wife, "Keep yourself to yourself, and don't marry again." To confirm this, another witness was called, who had also overheard the words, and stated them to be, "Keep yourself to yourself, and keep your own counsel;" on which Alderson, B, remarked, "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence." The prisoner was acquitted.

(*m*) *Suprà*, sect. 1, § 521.

(*n*) Burrill, Circ. Evid. 483 & 575.

through the testimony of witnesses, who may either have misunderstood, or who wilfully misreport it. 4. Assuming the matter correctly reported, the following observations of Bentham are certainly very pertinent and forcible. "The strength of it" (*i. e.*, the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: the strength of the appearances (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated), — the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorised (as in offences of a certain magnitude persons in general commonly are, under every system of law) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice, — authorised to take such measures, and to appearance having it in contemplation so to do: in such case, silence instead of answer to a question put to the party by such a person may afford an inference little (if at all) weaker than that which would be afforded by the like deportment in case of judicial interrogation before a magistrate. Suppose (on the other hand) a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself, — put at a time when no fresh incident leads to it; put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due, — in a case like this, the strength of the inference may vanish altogether" (*o*).

§ 575. Connected with the subject of non-responsion is that of incomplete or "evasive responsion;" *i. e.*, where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question, or while denying his guilt, refuses to show his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional considerations: 1. A man ever so innocent cannot always explain all the circumstances which press against him. Thus, on a charge of murder, the accused declared himself unable to explain how his night-dress became stained with blood; the truth being that, unknown to him, his bed-fellow had had a bleeding wound (*p*). So a man charged with larceny could not explain how the stolen property found its way into his house or trunk, it having been, unknown to him, depos-

(*o*) 3 Benth. Jud. Ev. 92.

(*p*) See a case of this kind in Chambers' Edinburgh Journal, for March 11, 1837.

ited there by others (*q*). 2. In many cases an accused or suspected person can only explain particular circumstances by criminating other individuals whom he is unwilling to expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal. Sometimes, too, though blameless in the actual instance, he could only prove himself so by showing that he was guilty of some other offence. 3. Where a prosecution is altogether groundless, — the result of conspiracy, or likely to be supported by perjured testimony, — it is often good policy on the part of its intended victim not to disclose his defence until it is judicially demanded of him on his trial.

§ 576. "False responsion," however, is a criminative fact very much stronger than either of the former. Bentham justly observes that, in justification of simple silence, the defence founded on incompetency on the part of the interrogator may be pertinent, and even convincing, but that to false responsion the application of it could scarcely extend. To the claim which the question had to notice, the accused or suspected person has himself borne sufficient testimony; so far from grudging the trouble of a true answer, he bestowed upon it the greater trouble of a lie (*r*). The infirmative hypotheses here seem to be, — 1. The possibility of extra-judicial conversations having been misunderstood or misreported. 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defence, false statements may arise from the same cause. The maxim "Omnia præsumuntur contra spoliatorem," to which that subject belongs, has been examined in a former chapter (*s*).

§ 577. While the vulgar notion, derived probably from mediæval times, — when it was sanctioned by the then all powerful authority of the civilians and canonists (*t*), — that confessions of guilt are necessarily true, is at variance with common-sense, experience, law, and practice, still, it must never be forgotten that, in general, such confessions constitute proof of a very satisfactory, and when in a judicial or plenary shape, of the most satisfactory character. Reason and the universal voice of mankind alike attest this; and the legitimate use of the unhappy cases above recorded, and others of a similar stamp, is to put tribunals on their guard against attaching undue weight to this sort of evidence. The employing them as bugbears to terrify, or the converting them into excuses for indiscriminate scepticism or incredulity, is a perversion, if not a prostitution, of the human understanding.

(*q*) See bk. 2, pt. 2, § 206.
(*r*) 3 Benth. Jud. Ev. 94.
(*s*) *Suprà*, ch. 2, sect. 2, sub-sect. 8.
(*t*) See *suprà*, § 554.

AMERICAN NOTES.

(§ 551) Confessions. — (*a*) *Rule.* — Admissions by a person accused of crime suggesting the inference that such crime was in fact committed as alleged are admissible against such person. 1 Greenl. Ev. §§ 213-235; Brown *v.* State, 32 Miss. 433, 449; State *v.* Hollenscheit, 61 Mo. 302; State *v.* Brown, 48 Ia. 382, Cain *v.* State, 18 Tex. 387; State *v.* Carrick, 16 Nev. 120; Blackburn *v.* Com., 12 Bush (Ky.), 181, 186; Com. *v.* Sanborn, 116 Mass. 61; Eiland *v.* State, 52 Ala. 322, 334; Cox *v.* People, 80 N. Y. 500, 515. See also State *v.* Cox, 65 Mo. 29; Com. *v.* Lannan, 13 All. 563. *Provided*, (1) the court is satisfied that such admissions were made voluntarily. People *v.* Soto, 49 Cal. 67; Murphy *v.* State, 63 Ala. 1; Barnes *v.* State, 36 Tex. 356; Murphy *v.* People, 63 N. Y. 590, 596; Com. *v.* Culver, 126 Mass. 464; State *v.* Vann, 82 N. C. 631; Harding *v.* State, 54 Ind. 359, 367; Young *v.* Com., 8 Bush, 366; State *v.* Garvey, 28 La An. 925; State *v.* Duncan, 64 Mo. 262. But see Garrard *v.* State, 50 Miss. 147, State *v.* Brite, 73 N. C. 26; U. S. *v.* Kirkwood, 5 Utah, 123; People *v.* Wolcott, 51 Mich. 612; State *v.* Anderson, 96 Mo. 241; Com. *v.* Flood, 152 Mass. 529; Searcy *v.* State, 28 Tex. App. 513; Green *v.* State, 88 Ga. 516; State *v.* George, 93 N. C. 567. As to what is voluntary, see Com. *v.* Nott, 135 Mass. 269; R. *v.* Romp, 17 Ont. Rep. 567. Whether a confession is voluntary is a question for the jury People *v.* Cassidy, 133 N. Y. 612 And *provided*, (2) that the crime charged is at least plausibly established (though not necessarily in a manner *prima facie* conclusive) by evidence other than such admission. Com. *v.* Smith, 119 Mass. 305; Bergen *v.* People, 17 Ill. 426; Johnson *v.* State, 59 Ala. 37; State *v.* German, 54 Mo. 526; State *v.* Knowles, 48 Ia. 598; Smith *v.* Com., 21 Gratt 809; People *v.* Thrall, 50 Cal. 415; Pitts *v.* State, 43 Miss. 472, 480; U. S. *v.* Williams, 1 Cliff. 5; Lyon *v.* Lyon, 62 Barb. 138. Such admissions may extend to proof of independent probative facts, though the term "confession" as commonly employed indicates rather an admission of criminal conduct than an admission of facts from which such criminality may be inferred. State *v.* Red, 53 Ia. 69; Frazer *v.* State, 55 Ga. 325; Bergen *v.* People, 17 Ill. 427; People *v.* Parton, 49 Cal. 632. The rule applies to acts as well as statements. State *v.* Crowson, 98 N. C. 595.

(*b*) *What Confessions are Voluntary.* — No confession is considered "voluntary" if in the opinion of the judge it was made under such stress of promised advantage or threatened disadvantage, directly connected with the pending proceedings, from persons in authority, as renders it probable that the truth of such confession will be injuriously affected. Com. *v.* Cuffee, 108 Mass. 285; Fouts *v.* State, 8 Oh. St. 98; Young *v.* Com., 8 Bush (Ky.), 366; State *v.* Wentworth, 37 N. H. 196; U. S. *v.* Nott, 1 McLean, 499; Fife *v.* Com., 29 Pa. St. 429; State *v.* Carr, 37 Vt. 191; Garrard *v.* State, 50 Miss 147; State *v.* Lowhorne, 66 N. C. 638; People *v.* Barric, 49 Cal. 342. Prosecuting and arresting officers, magistrates, jailers, and all persons in positions similar to the above, are "persons in authority" within the meaning of this provision. Vaughan *v.* Com, 17 Gratt. 576; State *v.* Gossett, 9 Rich. 428; Ward *v.* State, 50 Ala. 120; Austine *v.* People, 51 Ill. 236; Beery *v.* U. S., 2 Colorado, 186. See also Com. *v.* Sego, 125 Mass. 210, Shifflet *v.* Com., 14 Gratt. 652; State *v.* Tatro, 50 Vt. 483. A confession made after such influence has been removed, may still be voluntary. Early's case, 86 Va. 921. To the general rule, as above stated, there is a recognized exception. One who turns "state's evidence" does so under the implied condition that, should he refuse to testify when called as a witness, his former confession can be used against himself, though such confession is inspired by the hope of pardon. The distinction that such proffer of pardon constitutes an inducement to accuse others, and not himself, seems fine Com. *v* Knapp, 10 Pick. 477, 489. That an inadmissible confession furnishes the only clew to otherwise admissible evidence is no ground for the rejection of the latter, and so much of the confession as is necessary to explain it. U. S. *v.* Richard, 2 Cranch, C Ct 439; State *v.* Garrett, 71 N. C. 85; Lowe *v.* State, 88 Ala. 8 Yates *v.* State, 47 Ark. 172;

People *v.* McGloin, 91 N. Y. 241; Com. *v.* Knapp, 9 Pick. 496, 511; Clemons *v.* State, 4 Lea, 23; State *v.* Vaigneur, 5 Rich. (S. C.) 391; Duffy *v.* People, 26 N. Y. 588; Murphy *v.* State, 63 Ala. 1; People *v.* Hoy Yen, 34 Cal. 176; Belote *v.* State, 36 Miss. 96; Fredrick *v.* State, 3 W. Va. 695; Massey *v.* State, 10 Tex. Ct. App. 645; Beery *v.* U. S., 2 Col. 186; Laros *v.* Com., 84 Pa. St. 200. See also People *v.* McCoy, 45 How. Prac. 216; Com. *v.* James, 99 Mass. 438.

(*c*) *Conspirators.* — If a conspiracy be plausibly established, admissions by a conspirator concerning acts done during the continuance of the conspiracy, and in furtherance of its objects, are admissible against his fellows. Lincoln *v.* Claflin, 7 Wall. 132; U. S. *v.* McKee, 3 Dill. 546; Kehoe *v.* Com., 85 Pa. St. 127, 136; Smith *v.* State, 52 Ala. 407; Com. *v.* McDonald, 147 Mass. 527; Lowe *v.* Dalrymple, 117 Pa. St. 564; Com. *v.* Smith, 151 Mass. 491; Goins *v.* State, 46 Oh. St. 457; State *v.* Melrose, 98 Mo. 594; Territory *v.* Campbell, 9 Mont. 16; State *v.* Anderson, 92 N. C. 732; Com. *v.* O'Brien, 140 Pa. St. 555; State *v.* Brady, 107 N. C. 822; State *v.* Brown, 34 S. C. 41; Tucker *v.* Finch, 66 Wis. 17; Dodge *v.* Goodell, 16 R. I. 48. But see Smith *v.* State, 21 Tex. App. 107; Williams *v.* State, 47 Ind. 568; State *v* Thibeau, 30 Vt. 100; Loggins *v.* State, 8 Tex. Ct. App. 434, 444; State *v.* Jackson, 29 La. An. 354; People *v.* Geiger, 49 Cal. 643. See also State *v.* Duncan, 64 Mo. 262; Kelley *v.* People, 55 N. Y. 565. But the court must be first satisfied by evidence *aliunde* of the existence of such conspiracy. Hamilton *v.* People, 29 Mich. 195; Hightower *v* State, 22 Tex. 605; Brown Co. *v.* Perrill, 77 Tex. 199; Menges *v.* State, 25 Tex. App. 710; Brown's case, 86 Va. 935; Clawson *v.* State, 14 Oh. St. 234; State *v.* Daubert, 42 Mo. 239; Garrard *v.* State, 50 Miss. 147; Com. *v.* Waterman, 122 Mass. 43; Ormsby *v.* People, 53 N. Y. 472. Statements of conspirators made after ending of conspiracy do not bind each other. Logan *v.* U. S., 144 U. S. 263; People *v.* McQuade, 110 N. Y. 284.

(*d*) *Confessions by Conduct.* — So called confessions by conduct are usually original circumstantial evidence. Conf. § 519, n. 1 (*c*), *supra;* M'Kee *v.* People, 36 N. Y. 113, 118; Lawson *v.* State, 20 Ala. 65; Noftsinger *v.* State, 7 Tex. Ct. App. 301, 322; People *v.* Stanley, 47 Cal. 113. So of statements made in presence of the accused under circumstances which call for denial if false. Murphy *v.* State, 36 Oh. St. 628; State *v.* Reed, 62 Me. 129, 141; People *v.* Estrado, 49 Cal. 171; Broyles *v.* State, 47 Ind. 251; Com. *v.* Brown, 121 Mass. 69, Kelley *v.* People, 55 N. Y. 565; State *v* Bowman, 80 N. C 432; Slattery *v.* People, 76 Ill. 217; Drumright *v.* State, 29 Ga. 430. See also State *v.* Edwards, 13 S. C 30; Campbell *v.* State, 55 Ala. 80.

(*e*) *Form of Confession.* — Evidence given under oath in a former trial may be afterwards used as a confession. Dickerson *v.* State, 48 Wis. 288; State *v.* Broughton, 7 Ired. (N. C.) L. 96; Com. *v* Reynolds, 122 Mass. 454; Teachout *v.* People, 41 N. Y. 7; Alston *v.* State, 41 Tex. 39; Anderson *v.* State, 26 Ind. 89; State *v.* Gilman, 51 Me. 206; Snyder *v.* State, 56 Ind. 105. But see Jackson *v.* State, 56 Miss. 311; People *v* Garvey, 25 La. An. 191. A criminal admission may be made in any form. Abbott *v.* People, 75 N. Y. 602; Com. *v.* Clark, 130 Pa. St. 641; Com. *v.* Bradford, 126 Mass. 42. If such admission be reduced to writing, it becomes subject to the rules governing documentary evidence. Conf. § 215, n 1, C. III. (*a*), *supra;* State *v.* Branham, 13 S. C. 389; Cicero *v.* State, 54 Ga. 156; Wright *v.* State, 50 Miss. 332. But see State *v.* Rowe, 61 Me. 171. A confession is still admissible, if "voluntary" in the sense given *supra*, though made under promise of secrecy. State *v.* Mitchell, 1 Phil. (N. C.) L. 447; State *v.* Darnell, 1 Houst. C. R. (Del.) 321. Or gained by deception, fraud, or illegality. Balbo *v.* People, 80 N. Y. 484, 499; Com. *v.* Hanlon, 3 Brewst. (Pa.) 461, 499; State *v.* Jones, 54 Mo. 478; Price *v.* State, 18 Oh. St. 418; King *v.* State, 40 Ala. 314; R. *v.* Doyle, 12 Ont. Rep. 347. Or during intoxication, *provided* the party confessing be conscious of his doings. Eskridge *v.* State, 25 Ala. 30; Williams *v.* State, 12 Lea, 211; People *v.* Ramirez, 56 Cal. 533; Jefferds *v.* People, 5 Parker, C. R. 522, 547, 560; Com. *v.* Howe, 9 Gray, 110; State *v.* Feltes, 51 Ia. 495. See also Lester *v.* State, 32 Ark. 727. Or while under arrest. People *v.* Chapleau, 121 N. Y. 266. But confessions made during sleep are not admissible. People *v.* Robinson, 19 Cal. 40. So of a confession obtained by duress. State *v.* Carrick, 16 Nev. 120; State *v.* Drake, 82 N. C. 592; Joe *v.* State, 38 Ala. 422; Self *v.* State, 6 Baxter, 244. But see Cady *v.*

State, 44 Miss. 332; State *v.* Branham, 13 S. C. 389, 395; State *v.* Graham, 74 N. C. 646; Butler *v.* Com., 2 Duval (Ky.), 435.

All confessions, properly so called, are open to explanation or rebuttal. State *v.* Brown, 1 Mo. Ct. App. 86. With regard to confessions generally, it may be said that, like admissions in civil cases, they often constitute a *levamen probationis*. As Dr. Wharton expresses it, "a confession is rather a fact to be proved by evidence, than evidence to prove a fact." Whar. Crim. Ev. § 623.

CHAPTER VIII.

EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

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§ 578. UNDER this head might in strictness be classed all evidence which may be rejected by virtue of any exclusionary rule, seeing that it is to public policy all such rules owe their existence.[1] But the expression, "evidence rejected on grounds of public policy," is here used in a limited sense; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that, from its reception, some collateral evil would ensue to third parties or to society. One species of this has been already treated of under the head of witnesses, who, as has been shown, are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, or even, in some cases, merely to degrade them (*a*). But taking a general view of the subject, the matters thus excluded on grounds of public policy may be divided into *political*, *judicial*, *professional*, and *social*. Under the first come all secrets of state, such as state papers, and all communications between government and its officers, — the privilege in such cases not being that of the person who is in possession of the secret, but that of the public, as a trustee for whom the secret has been intrusted to him (*b*). Another illustration of the same privilege is to be found in the rule that the channels through which information reaches the ears of government

(*a*) Bk. 2, pt. 1, ch. 1.

(*b*) See *Dawkins* v. *Lord Rokeby*, L. Rep., 8 Q. B. 255; and note that the Official Secrets Act, 1889, by § 2, punishes as a misdemeanour the breach of official trust, by improper disclosure of any document or information officially obtained.

[1] For American cases on the subject, see *infra*, p. 537.

must not be disclosed (*c*), — a rule which was recently applied, in *Marks* v. *Beyfus* (*c'*), to the case of a public prosecution instituted by the director of public prosecutions, in which it was held by the Court of Appeal that that official, who had been called as a witness, could not be compelled to disclose the names of the persons from whom he had received information, or the nature of the information received, Lord Esher, M. R., taking occasion to observe that even if he had been willing to make the disclosure sought, the judge at the trial ought not to have allowed him to do so.

§ 579. 2.° *Judicial.* The principal instance of this is in the case of jurymen. First, *grand* jurors cannot, at least in general, be questioned as to what took place among, or before them, while acting as such (*d*). In an early case on this subject (*e*) we are informed, that "the judge would not suffer a grand juryman to be produced as a witness, to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions." "See," adds the reporter, "if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such a case." He refers to a case of *Hitch* v. *Mallet*, where the point was raised, and adds a quære what became of it. Considering that the grand jury are the inquest of the county, whose duty is not merely to examine the bills of indictment sent before them, but to inquire into its state, and present to the Queen's justices anything they may find amiss in it, there appears reason for throwing the protection of secrecy over their deliberations. But perjury, or indeed any other offence committed in their presence, and afterwards made the subject of an indictment or information, is a very different matter. Suppose a witness were to murder or assault another witness in the presence of the grand jury, would not the evidence of its members be receivable against him? Or suppose, on a dispute arising out of the business before them, one of the grand jury were to murder or assault another, is he to go unpunished? The grand juror's oath is to keep secret "the Queen's counsel, his fellows', and his own" (*f*): it is obvious that the cases just put do not come under either of the latter heads; and, by instituting the prosecution, the crown has waived the privilege of secrecy so far as its rights are concerned (*g*).

(*c*) See *Attorney-General* v. *Bryant*, 15 M. & W. 169.

(*c'*) *Marks* v. *Beyfus*, 25 Q. B. D. 494, C. A. There is said to be an exception for the case where disclosure is necessary or desirable in order to show the prisoner's innocence. *Id.*

(*d*) Tayl. Ev. § 863, 4th Ed.

(*e*) Clayt. 84, pl. 140.

(*f*) 8 How. St. Tr. 759, 772, n. It was formerly considered treason or felony in a grand juror to disclose the king's counsel, 27 Ass. pl. 63; Bro. Abr. Corone, pl. 113.

(*g*) See 4 Christ. Blackst. Comm. 126, n. 4, 303, n. 1, and Tayl. Ev. § 863, 4th Ed.

§ 580. Secondly, the evidence of *petty* jurors is not receivable to prove their own misbehaviour, or that a verdict which they have delivered was given through mistake (*h*). In order to guard against misconceptions as to the findings of juries, it is the established practice of the courts not to receive a verdict unless all the jurors by whom it is given are present and within hearing; and after it is recorded, the officer rehearses it to them as recorded, and asks them if that is the verdict of them all. The allowing a juryman to prove the real or pretended misbehaviour or mistake of himself or his companions would open a wide door to fraud and malpractice in cases where it is sought to impeach verdicts.

§ 581. 3.° *Professional.* 1. At the head of these stand communications made by a party to his legal advisers, — *i. e.*, counsel, attorney, &c. (*i*); and this includes all media of communication between them; such as clerks (*j*), interpreters (*k*), or agents (*l*). But the privilege does not extend to matters of fact which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them (*m*). And the privilege is not the privilege of the professional man, but of the client, who may waive it or not, as he pleases (*n*). And his refusal to waive it raises no presumption against him (*o*). Moreover, the general rule is subject to the very important and proper exception that communications made by the client before the commission of a crime, for the purpose of being guided or helped in the commission of it, are not privileged from disclosure (*o'*).

§ 582. 2. Communications to a medical man, even in the strictest professional confidence, have been held not protected from disclosure (*p*), — a rule harsh in itself, of questionable policy, and at

(*h*) *Goodman* v. *Cotherington*, 1 Sid. 235; *Norman* v. *Beamont*, Willes, 487, n.; *Palmer* v. *Crowle*, Andr. 382; *Straker* v. *Graham*, 4 M. & W. 721. The competency of jurymen, as witnesses in a cause which they are trying, is a wholly different question; for which see bk. 2, pt. 1, ch. 2, § 187.

(*i*) *Waldron* v. *Ward*, Styl. 449; *Wilson* v. *Rastall*, 4 T. R. 753, 2 R. R. 515; *Taylor* v. *Foster*, 2 C. & P. 195; *Du Barré* v. *Livette*, 1 Peake, 77; *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Hibberd* v. *Knight*, 2 Exch. 11; *Cleave* v. *Jones*, 7 Exch. 421. See also Introd. pt. 2, § 53.

(*j*) *Taylor* v. *Foster*, 2 C. & P. 195.

(*k*) *Du Barré* v. *Livette*, 1 Peake, 77.

(*l*) *Parkins* v. *Hawkshaw*, 2 Stark. 239.

(*m*) *Dwyer* v. *Collins*, 7 Exch. 639, and the cases there referred to; *Brown* v. *Foster*, 1 H. & N. 736.

(*n*) Tayl. Ev. § 843.

(*o*) *Wentworth* v. *Lloyd*, 10 H. L. C. 589.

(*o'*) *Reg.* v. *Cox*, 14 Q. B. D. 153; 54 L. J. M. C. 41.

(*p*) *Duchess of Kingston's case*, 20 How. St. Tr. 572 *et seq.*; *R.* v. *Gibbons*, 1 C. & P. 97.

variance with the practice in France (*q*), and the statute law in some of the United States of America (*r*).

§ 583. 3. Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice, presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of *R.* v. *Gilham* (*s*) and *R.* v. *Wild* (*t*), added to some others that will be cited presently, have resolved this question in the negative; and the practice is in accordance with that notion. But *R.* v. *Gilham* only shows that a confession of guilt made by a prisoner, in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him, — a decision perfectly well founded, because such exhortations cannot possibly be considered "*illegal* inducements to confess." For by this expression, as shown in a former chapter (*u*), the law means language calculated to convey to the mind of a person accused or suspected of an offence, that by acknowledging guilt he will better his position, so far as it may be affected by the *temporal* consequences of that offence. And the ground on which the law rejects a confession, made after such an inducement to confess, is the reasonable apprehension that, in consequence of it, the party may have been led to make a false acknowledgment of guilt, — an argument wholly inapplicable where he is only told that, by his avowing the truth, a *spiritual* benefit will accrue to him. *R.* v. *Wild* is even less to the purpose; as the party who used the exhortation there neither was, nor professed to be, a clergyman. The other cases to which allusion has been made, are an anonymous one in Skinner (*v*), *R.* v. *Sparkes* (*w*), *Butler* v. *Moore* (*x*), and *Wilson* v. *Rastall* (*y*). In the first the question was respecting a confidential communication to a man of law, which Lord Chief Justice Holt, as might have been expected, held privileged from disclosure; adding *obiter* that it was otherwise "in the case of a gentleman, parson, &c." The second and third are decisions, one by Buller, J., on circuit, and the other by the Irish Master of the Rolls, that confessions to a Protestant or Roman Catholic clergyman

(*q*) Bonnier, Traité des Preuves, § 179.

(*r*) 1 Greenl. Ev. § 248, n. (2), 7th Ed.; Appleton, Evid. App. 276. The States referred to are, — New York, Missouri, Michigan, Wisconsin, and Iowa. The New York statute enacts that "no person, authorised to practise physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as surgeon."

(*s*) 1 Moo. C. C. 186.

(*t*) *Id.* 452.

(*u*) *Suprà*, ch. 7, sect. 3, subsect. 2, § 551.

(*v*) Skinn. 404.

(*w*) Cited in *Du Barré* v. *Livette*, 1 Peake, 77.

(*x*) MacNally's Evid. 253.

(*y*) 4 T. R. 753.

are not privileged; and in the fourth, the judges in banc say *obiter*, that the privilege is confined to the cases of counsel, solicitor, and attorney. How far a particular form of religious belief being disfavoured by law at the period (A. D. 1802) affected the decision in *Butler* v. *Moore*, is not easy to say; but both that case and *R.* v. *Sparkes* leave the general question untouched; and on the latter case being cited to Lord Kenyon, in *Du Barré* v. *Livette* (*z*), he said, "I should have paused before I admitted the evidence there admitted." He, however, decided that case on the ground that confidential communications to a legal adviser were distinguishable from others. It is also to be observed that, the subject coming incidentally before Best, C. J., in *Broad* v. *Pitt* (*a*), very shortly after *R.* v. *Gilham*, he referred to that case as deciding that the privilege in question did not apply to a clergyman; but added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence." In *R.* v. *Griffin* (*b*), tried before Alderson, B., at the Central Criminal Court, part of the evidence against the accused consisted of certain conversations between her and her spiritual adviser, the chaplain of a workhouse, relative to the transaction which formed the subject of accusation. On this evidence being offered, the judge expressed a strong opinion that it was not receivable, adding, however, "I do not lay this down as an absolute rule; but I think such evidence ought not to be given;" and the counsel for the prosecution accordingly withdrew it. The case is not fully reported, and the result is not stated. And lastly, in *R.* v. *Hay* (*c*), where the prisoner was indicted for stealing a watch, the watch was traced to the possession of a Roman Catholic priest, who was called as a witness for the prosecution; and who, on being asked, "From whom did you receive that watch?" refused to answer, as he said he "received it in connection with the confessional." Hill, J., ruled that he was bound to answer on the ground that by the above question he was not asked to disclose anything stated to him in the confessional, — a decision apparently unimpeachable in itself, but which leaves the general question untouched.

§ 584. There cannot, we apprehend, be much doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except perhaps when the matter thus communicated amounted to high treason. In the old laws of Hen. I. (*d*) is this passage, "Caveat sacerdos, ne de hiis qui ei

(*z*) 1 Peake, 77; 3 R. R. at p. 656.
(*a*) 3 C. & P. 518.
(*b*) 6 Cox, Cr. Cas. 219.
(*c*) 2 Fost. & F. 4.
(*d*) Leges Hen. 1, c. 5, § 17.

confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis; quod si fecerit, deponatur, et omnibus diebus vite sue ignominiosus peregrinando pœniteat." The laws of Hen. I. are of course not binding per se, and are only valuable as guides to the common law; but it is otherwise with the statute Articuli Cleri (9 Edw. II.), c. 10, which is as follows (*e*): "Quandoque aliqui confugientes ad ecclesiam . . . dum sunt in ecclesiâ custodiuntur per armatos infrà cimiterium, et quandoque infrà ecclesiam, ita arte quod non possunt exire locum sacrum causâ superflui ponderis deponendi, nec permittitur eis necessaria victui ministrari. *Responsio:* . . . dum sunt in ecclesiâ, custodes eorum non debent morari infrà cimiterium, nisi necessitas vel evasionis periculum hoc requirat. Nec arcentur confugi dum sunt in ecclesiâ, quin possint habere vite necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi ut latrones appellatores, quandocumque voluerint, possint sacerdotibus sua facinora confiteri; *sed caveant confessores, ne erronee hujusmodi appellatores informent.*" In commenting on this statute, Sir Edward Coke, writing, be it remembered, after the Reformation, expresses himself as follows (*f*): "Latrones vel appellatores. This branch extendeth only to thieves and approvers indicted of felony, but extended not to high treasons; for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realm; therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies: And albeit, if a man indicted of felony becometh an approver, he is sworn to discover all felonies and treasons, yet he is not in degree of an approver in law, but only of the offence whereof he is indicted; and for the rest, it is for the benefit of the king, to move him to mercy: So as this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeals of treason; for, by the common law, a man indicted of high treason could not have the benefit of clergy (as it was holden in the king's time, when this act was made), nor any clergyman privilege of confession to conceal high treason: And so it was resolved in 7 Hen. V. (Rot. Parl. anno 7 Hen. V. nu. 13); whereupon friar John Randolph, the Queen Dowager's confessor, accused her of treason, for compassing of the death of the king: And so was it resolved in the case of Henry Garnet (Hil. 3 Jac.),

(*e*) The above version of the statute is taken from the valuable work entitled "Statutes of the Realm, printed by command of his Majesty, King George the Third, in pursuance of an Address of the House of Commons: From Original Records and Authentic Manuscripts," A. D. 1810, *et seq.* It differs in several respects from that given by Sir Edward Coke in the 2nd Institute.

(*f*) 2 Inst. 629.

superiour of the Jesuits in England, who would have shadowed his treason under the privilege of confessions, &c.; and albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessors is observable, *ne erronice informent.*" We cite this passage to show the common law on this subject; but it is very doubtful whether the caveat at the end of the above enactment was inserted to warn the confessor against disclosing the secrets of the penitent *to others.* The grammatical construction and context seem to show that it was to prevent his abusing his privilege of access to the criminal, by conveying information to him from without; and the clause is translated accordingly in the best edition of the statutes (*g*).

§ 585. If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater error is the attempt to confine the privilege to the clergy of some particular creed. Courts of municipal law are not called on to determine the truth or merits of the religious persuasion to which a party belongs; or to inquire whether it exacts auricular confession, advises, or permits it: the sole question ought to be, whether the party who bonâ fide seeks spiritual advice should be allowed it *freely.* By a statute of New York (*h*), "No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." A similar statute exists in Missouri, Wisconsin, Michigan, and Iowa (*i*); and the like principle is recognised in France (*k*).

§ 586. 4°. *Social.* The applications of this principle to social life are few. The principal instance is in the case of communications between husband and wife. Such, says Professor Greenleaf (*l*), "belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept for ever inviolable; that nothing shall be extracted from the bosom of

(*g*) The edition referred to in note (*e*). See also Ruffhead's edition of the Statutes, A.D. 1762. Chapters 10–12 of the statute were repealed by the Statute Law Revision Act, 1863.

(*h*) 1 Greenl. Ev. p. 326, § 247, n. (1), 7th Ed.; Appleton, Ev. App. 275.

(*i*) 1 Greenl. Ev. p. 326, § 247, n. (1), 7th Ed.; Appleton, Ev. App. 276, 277.

(*k*) Bonnier, Traité des Preuves, § 179, who adds, "Le système contraire détruirait la confiance, qui seule peut amener le repentir, en donnant au prêtre les apparences d'un délateur, d'autant plus odieux qu'il serait revêtu d'un caractère sacré."

(*l*) 1 Greenl. Ev. § 254, 7th Ed.

the wife which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation." And the 16 & 17 Vict. c. 83, which renders husbands and wives competent and compellable witnesses for or against each other in civil cases, contains a special enactment, sect. 3, that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." And after a marriage has been admitted or proved, the evidence of neither husband nor wife will be received to disprove the fact of sexual intercourse having taken place between them (*m*) during their married life (*n*), — a rule justly designated by Lord Mansfield as "founded in decency, morality, and policy" (*o*). But where the marriage itself is in dispute, or where it is disputed whether a child was born before or after marriage, the evidence of parents is admissible to prove that they were never married, or that the child was born before marriage (*n*).

Secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected (*p*).

§ 587. Courts of justice, as has been shown in the Introduction to this work (*q*), possess an inherent power of rejecting evidence, which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law, as well as to injure the opposite party.

It has been said that the law excludes, on public grounds, evidence which is indecent or offensive to public morals, or injurious to the feelings of third persons (*r*). But not only is there no direct authority for such a proposition, but there is authority to the contrary (*s*). "Indecency of evidence," observed Lord Mansfield, C. J., in *Da Costa* v. *Jones*, in which the court refused to try an action on a wager, on the ground that the wager was *itself* indecent, "is no objection to its being received where it is necessary to the decision of a civil or criminal right."

(*m*) *R.* v. *Reading*, Cas. temp. Hardw 79; *R. v. Rook*, 1 Wils. 340; *R.* v. *Luffe*, 8 East, 192; *R.* v. *Kea*, 11 *Id.* 132; *Cope* v. *Cope*, 1 Moo & R. 269; *R.* v. *Sourton*, 5 A. & E. 180, *Wright* v. *Holdgate*, 3 Car. & K. 158.

(*n*) *Murray* v. *Milner*, 12 Ch. D. 845.

(*o*) *Goodwright* d. *Stevens* v. *Moss*, Cowp. 594

(*p*) See the judgment of Lord Kenyon in *Wilson* v. *Rastall*, 4 T. R. 758, and the cases from the State Trials there referred to.

(*q*) Introd. pt. 2, § 47.

(*r*) Taylor on Evidence, § 867.

(*s*) Stephen on Evidence, p. 147, citing *Da Costa* v. *Jones*, Cowp. 729.

AMERICAN NOTES.

(§ 578) Privileged Witnesses and Communications. — A witness, perfectly competent, is not, by policy of law, compelled or permitted to testify *as to certain subjects*. Thus: —

(*a*) *State Secrets.* — No person will be required to testify with regard to state secrets, or as to correspondence between government officials on matters of public business, if, in the opinion of the head of the department, such disclosure would injuriously affect the public interest. Marbury *v.* Madison, 1 Cranch, 137, 144; 1 Burr's Trial (Hopkins & Earle's Ed.), 177, 186, 187, per Marshall, C. J.; Gray *v.* Pentland, 2 S. & R. 23; Totten *v.* U. S., 92 U. S. 105; Worthington *v.* Scribner, 109 Mass. 487; Thompson *v.* German Valley R. R., 22 N. J. Eq. 111; Hartranft's Appeal, 85 Pa. St. 433. See also Clark *v.* Field, 12 Vt. 485; Bradley *v.* McIntosh, 5 Ont. Rep. 227; Gugy *v.* Maguire, 13 L. Can. 33.

(*b*) *Jury Secrets.* — In like manner the proceedings of grand or petit jurors and all communications to or by them acting as such are privileged from investigation. State *v.* Oxford, 30 Tex. 428; Meade *v.* Smith, 16 Conn. 346; Folsam *v.* Manchester, 11 Cush. 334, 337; State *v.* Beebe, 17 Minn. 241; Woodward *v.* Leavitt, 107 Mass. 453; Heffron *v.* Gallupe, 55 Me. 563. It has, however, been held that in cases of gross misconduct the testimony of a *petit* juror may be received to impeach the verdict. Wright *v.* Illinois, &c. Tel. Co. 20 Ia. 195; People *v.* Hughes, 29 Cal. 257; Crawford *v.* State, 2 Yerg. 60; Deacon *v.* Shreve, 22 N. J. L. 176; Ritchie *v.* Holbrooke, 7 S. & R. 458. See also Heffron *v.* Gallupe, 55 Me. 563. So the evidence of a petit juror may be used to show what matters were passed on. Follansbee *v.* Walker, 74 Pa. St. 306. See also Cramer *v.* Burlington, 42 Ia. 315. But the general rule is to the effect that impeaching evidence is not admissible. Read *v.* Com., 22 Gratt. 924; State *v.* Godwin, 5 Ired. (N. C.) L. 401; Johnson *v.* State, 27 Tex. 758; Hudson *v.* State, 9 Yerg. 408; State *v.* Stokely, 16 Minn. 282; State *v.* Coupenhaver, 39 Mo. 430; State *v.* Millican, 15 La. An. 557; Bennett *v.* State, 3 Ind. 167; State *v.* Ayer, 23 N. H. 301; Hannum *v.* Belchertown, 19 Pick. 311; Studley *v.* Hall, 22 Me. 198; Coker *v.* Hayes, 16 Fla. 368. So it has been held that *grand* jurors can reveal nothing whatever with regard to the secrets of their jury-room Imlay *v.* Rogers, 2 Halst. (N. J.) 347; Beam *v.* Link, 27 Mo. 261; McLellan *v.* Richardson, 1 Shepl 82; State *v.* Fasset, 16 Conn. 457, 466. At present, however, it seems that any material matters in this connection are open to investigation when public policy demands it. U. S. *v.* Charles, 2 Cranch, C. Ct. 76; People *v.* Young, 31 Cal. 563; Way *v.* Butterworth, 106 Mass. 75; Burdick *v.* Hunt, 43 Ind. 381; State *v.* Broughton, 7 Ired. (N C.) L. 96; State *v.* Wood, 53 N. H. 484; Rocco *v.* State, 37 Miss. 357; State *v.* Benner, 64 Me. 267, 284. But the evidence of a grand juror is not admissible to impeach the finding or explain the vote of the jury. State *v.* Baker, 20 Mo. 338; People *v.* Hulbut, 4 Denio, 133; State *v.* Beebe, 17 Minn. 241; State *v.* Oxford, 30 Tex. 428.

(*c*) *Public Justice.* — So a witness will not be compelled to answer any question which, in the opinion of the judge, is reasonably calculated to embarrass the orderly administration of justice, whether by suggesting the source of information as to offences, or in any other manner. U. S. *v.* Moses, 4 Wash. C. Ct. 726; Worthington *v.* Scribner, 109 Mass. 487; Oliver *v.* Pate, 43 Ind. 132, 141; State *v.* Soper, 16 Me. 293. See also Knott *v.* Sargent, 125 Mass. 95. But a judge may be a witness as to facts coming to his knowledge in a judicial capacity. *In re* Heyward, 1 Sandf. 701. See also 24 Sol Jour. 398.

(*d*) *Self-Crimination.* — No witness will be compelled to answer any question the answer to which would in the opinion of the court fairly tend to criminate such witness; *i. e.*, expose him to a criminal penalty, punishment, or forfeiture. Const. of U. S. Amend. V.; 1 Greenl. Ev. §§ 451, 453; 1 Burr's Trial (Hopkins & Earle's Ed.), 245; Emery's case, 107 Mass. 172; Coburn *v.* Odell, 30 N. H. 540; Chamberlain *v.* Willson, 12 Vt. 491; Phelin *v.* Kenderdine, 20 Pa. St. 354, 363; Burton *v.* Young, 17 L Can. 379; Lami *v.* Rabouin, 1 Rev. Lég. 687, Maguire Exp., 14 Quebec, 359; State *v.* Talbott, 73 Mo. 347;

State *v.* Blake, 25 Me. 350; State *v.* Olin, 23 Wis 309; Simmons *v.* Holster, 13 Minn. 249; State *v.* Marshall, 36 Mo. 400. There is some slight authority for the position that the criminating quality of the question is to be left entirely to the determination of the witness. Warner *v.* Lucas, 10 Oh. 336; Poole *v.* Perritt, 1 Speers (S. C.), 128. But see, *contra,* Richman *v.* State, 2 Greene (Ia.), 532; Kirschner *v.* State, 9 Wis. 140; Floyd *v.* State, 7 Tex. 215. The possibility of danger is for the court; its existence is for the witness. In no case, however, is it necessary that the witness should so far nullify his privilege as to explain exactly how the question asked will injuriously affect him. Janvrin *v.* Scammon, 29 N. H. 280; Chamberlain *v.* Willson, 12 Vt. 491. Whether the witness may claim his privilege at any time during his examination is a point not entirely clear. That by answering questions with regard to the incriminating subject he is considered to have waived the privilege *in toto,* see Chamberlain *v.* Willson, 12 Vt. 491; State *v.* Foster, 23 N. H. 348; Com. *v.* Price, 10 Gray, 472. It is, however, in all cases necessary that the danger to which the witness claims to be exposed is one reasonably to be apprehended. For the constitutional operation of statutory immunity, see U. S. *v.* Three Tons of Coal, 6 Biss. 379, 389, 397; People *v.* Hackley, 24 N. Y. 74, 83; Emery's case, 107 Mass. 172; State *v.* Quarles, 13 Ark. 307. The privilege extends to particular facts, which may prove "links" in a chain of evidence. 1 Burr's Trial (Hopkins & Earle's Ed.), 244; Janvrin *v.* Scammon, 29 N. H. 280; Printz *v.* Cheeney, 11 Ia. 469; Bank of Salina *v.* Henry, 2 Denio, 155; Lea *v.* Henderson, 1 Cold. (Tenn.) 146; Eaton *v.* Farmer, 46 N. H. 200. A prisoner cannot be compelled to furnish evidence against himself by trying on shoes, fitting his foot to tracks, &c. Stokes *v.* State, 5 Baxt. 619; Blackwell *v.* State, 67 Ga. 76; People *v.* Mead, 50 Mich. 228; McGuff *v.* State, 88 Ala. 147. But see, *contra,* State *v.* Graham, 74 N. C. 646; Walker *v.* State, 7 Tex. App. 245; Cooper *v.* State, 86 Ala. 610; State *v.* Ah Chuey, 14 Nev. 79; State *v.* Garrett, 71 N. C. 85; Spicer *v.* State, 69 Ala. 159; State *v.* Prudhomme, 25 La. An. 522; O'Brien *v.* State, 125 Ind. 38. See also, Sprouse's Case, 81 Va. 374; State *v.* Baker, 33 W. Va. 319. A witness can, of course, waive his privilege Gordon *v.* State, 68 Ga. 814; Spies *v.* People, 122 Ill. 1.

Same Subject. — The objection that the question is criminating, is personal to the witness; it cannot be taken by party or counsel. Com. *v.* Shaw, 4 Cush. 594; State *v.* Wentworth, 65 Me. 234, State *v.* Foster, 23 N. H. 348, 354; Lothrop *v.* Roberts, 16 Col. 250, Roddy *v.* Finnegan, 43 Md 490, 502; White *v.* State, 52 Miss. 216, 225. See also Phelin *v.* Kenderdine, 20 Pa St. 354, 363; Clark *v.* Reese, 35 Cal 89. Nor is it the duty of the court to suggest it. Com. *v.* Howe, 13 Gray, 26. But see Lea *v* Henderson, 1 Cold. (Tenn.) 146, 150; Close *v.* Olney, 1 Denio, 319; Mayo *v.* Mayo, 119 Mass. 290. That a refusal to answer such questions is competent evidence for the consideration of the tribunal of fact, see Andrews *v.* Frye, 104 Mass. 234.

(1) *Crimination by Husband or Wife.* — As to whether husband and wife can be compelled to criminate each other in collateral proceedings is somewhat in dispute The better rule seems to be that husband and wife may testify to such matters, though they cannot be compelled to do so. Com. *v.* Reid, 8 Phila. Rep. 385; State *v.* Briggs, 9 R. I. 361; State *v.* Dudley, 7 Wis. 664; State *v.* Bridgman, 49 Vt. 202; State *v.* Marvin, 35 N. H. 22. Earlier cases take the ground that husband or wife cannot testify, even in proceedings between other parties, to matters which would tend to criminate each other. It is an exclusion, and not a privilege. State *v.* Welch, 26 Me 30; State *v.* Gardner, 1 Root, 485; People *v.* Horton, 4 Mich. 67; Com. *v.* Sparks, 7 All 534. See also Bronson *v.* Bronson, 8 Phila. Rep. 261. But in collateral proceedings husband and wife are competent witnesses to *impeach* each other. Ware *v.* State, 35 N. J. L. 553.

(2) *Position of a Defendant.* — The defendant in a criminal action, by offering himself as a witness and taking the stand, is considered to have waived his privilege as to self-crimination, and must answer such questions as are put to him. Com *v.* Nichols, 114 Mass. 285; Connors *v.* People, 50 N. Y. 240; People *v.* Brown, 72 N. Y. 571, 574; State *v.* Wentworth, 65 Me. 234; Foster *v.* People, 18 Mich. 266; People *v.* Freshour, 55 Cal 375. But see also Stover *v.* People, 56 N. Y. 315; Com. *v.* Tolliver, 119 Mass. 312; State *v.* Thomas, 68 Mo. 605; Cooley, Const. Limit. * 317; State *v.* Ober, 52 N. H. 459; State *v.* Huff, 11 Nev. 17; Long *v.* State, 56 Ind. 182; Roddy *v* Finnegan, 43 Md. 490, 502. See also § 644, n. 1, B. (*b*), II., *infra.* As to what inference, if any, can legitimately be drawn

from the fact that the defendant does not go on the stand, see State *v.* Bartlett, 55 Me. 200; Moore *v.* Wright, 90 Ill. 470; Devries *v.* Phillips, 63 N. C. 53; State *v.* Cameron, 40 Vt. 555; Com. *v.* Scott, 123 Mass. 239; Carter *v.* Beals, 44 N. H. 408; People *v.* Tyler, 36 Cal. 522.

(*e*) *Communications between Husband and Wife.* — Private communications between husband and wife, made during coverture, are absolutely privileged. 1 Greenl. Ev. § 254; 2 Tilton-Beecher Trial (Abb. Ed.), 48, 66, 86, 103, 116; Stein *v.* Bowman, 13 Pet. 209, 222; Murphy *v.* Com., 23 Gratt. 960; Perry *v.* Randall, 83 Ind. 143; Com. *v.* Cleary, 152 Mass. 491; Mechelke *v.* Bramer, 59 Wis. 57; Jenne *v.* Marble, 37 Mich. 319, 322; Castello *v.* Castello, 41 Ga. 613; Drew *v.* Tarbell, 117 Mass. 90. So by statute in Missouri. Moore *v.* Wingate, 53 Mo. 398. See also Wood *v.* Chetwood, 27 N. J. Eq. 311; Southwick *v.* Southwick, 9 Abb. (N. Y.) Prac. N. S. 109. The privilege, however, is personal, and does not attach to the subject-matter. Such a conversation is admissible if overheard by third parties. Com. *v.* Griffin, 110 Mass. 181; State *v.* Center, 35 Vt. 378; Allison *v.* Barrow, 3 Cold. 414; State *v.* Hoyt, 47 Conn. 518, 540; State *v.* Buffington, 20 Kans. 599, 613. But see Westerman *v.* Westerman, 25 Oh. St. 500. A conversation overheard by small children taking no part therein is still private. Jacobs *v.* Hester, 113 Mass. 157. But see Lyon *v.* Prouty, 154 Mass. 488; Gannon *v.* People, 127 Ill. 507. The admissibility of such evidence is not affected by death or divorce. Griffin *v.* Smith, 45 Ind. 366; Crose *v.* Rutledge, 81 Ill. 266; Spradling *v.* Conway, 51 Mo. 51; Lingo *v.* State, 29 Ga. 470; Cook *v.* Grange, 18 Ohio, 526; Walker *v.* Sanborn, 46 Me. 470; Pillow *v.* Thomas, 57 Tenn. 120, 129. See also Litchfield *v.* Merritt, 102 Mass. 520. Nor by the existence of statutes making husband and wife competent witnesses in suits affecting the other. Jones *v.* Simpson, 59 Me. 180; Young *v.* Gilman, 46 N. H. 186; Reeves *v.* Herr, 59 Ill. 81; Castello *v.* Castello, 41 Ga. 613; Moore *v.* Wingate, 53 Mo. 398; State *v.* McCord, 8 Kans. 232; Robinson *v.* Chadwick, 22 Oh. St. 527; Keator *v.* Dimmick, 46 Barb. 158, 163. It has been held that the fact of non-communication between husband and wife is also privileged. Goodrum *v.* State, 60 Ga. 509. Persons to whom confidential statements have been reported by husband or wife are not permitted to testify to such statements. Brown *v.* Wood, 121 Mass. 137. By statute, letters between husband and wife may be privileged. Selden *v.* State, 74 Wis. 271. Husband and wife can testify to offences against each other. Bramlette *v.* State, 21 Tex. App. 611.

(*f*) *Professional Communications.* — Communications between a client and legal adviser acting in his professional capacity are absolutely and perpetually privileged in all suits whatever, whether the client be a party thereto or not. 1 Greenl. Ev. § 236 *et seq.*; Heister *v.* Davis, 3 Yeates, 4; Chirac *v.* Reinicker, 11 Wheat. 295; Sargeant *v.* Hampden, 38 Me. 581; Riley *v.* Johnston, 13 Ga. 260; Jenkinson *v.* State, 3 Blackf. 465; Chillicothe, &c. Co. *v.* Jameson, 48 Ill. 281; Patten *v.* Moore, 29 N. H. 163; Hull *v.* Lyon, 27 Mo. 570; Bowers *v.* State, 29 Oh. St. 542; Maxham *v.* Place, 46 Vt. 434; Orton *v.* McCord, 33 Wis. 205; Higbee *v.* Dresser, 103 Mass. 523; Chahoon *v.* Com., 21 Gratt. 822; State *v.* Hazleton, 15 La. An. 72; Casey *v.* State, 36 Ark. 67; Bacon *v.* Frisbie, 80 N. Y. 394; Thorp *v.* Goewey, 85 Ill. 611; People *v.* Atkinson, 40 Cal. 284; Forsyth *v.* Charlebois, 12 L. C. Jur. 264; Ebersole *v.* Rankin, 102 Mo. 488; Nelson *v.* Becker, 32 Neb. 99; Kaut *v.* Kessler, 114 Pa. St. 603; Orman *v.* State, 22 Tex. App. 604; Bigler *v.* Reyher, 43 Ind. 112; Tays *v.* Carr, 37 Kans. 141. An attorney may state collateral facts; *e. g.*, who employed him. Beamer *v.* Darling, 4 Q. B. U. C. 249. For communications concerning a compromise with creditors, no privilege. Fraser *v.* Sutherland, 2 Grant's Ch. 442. Aliter of a title. Wilson *v.* Brunskill, 2 Chan. Chamb. 137. But attorney acting as scrivener is not privileged. Stallings *v.* Hullum, 79 Tex. 421; Thomas *v.* Griffin, 1 Ind. App. 457; Hanlon *v.* Doherty, 109 Ind. 37. If attorney is permitted by the court to state privileged communications, it will be deemed a surprise on parties. Livingstone *v.* Gartshore, 23 Q. B. U. C. 166. For similar reasons the agent or interpreter of such client or legal adviser is not compellable to testify with regard to a privileged communication of which he was the natural means of transmission. Andrews *v.* Solomon, Pet. C. Ct. 356; Jackson *v.* French, 3 Wend. 337; Brand *v.* Brand, 39 How. (N. Y.) Prac. 193, 260; Parker *v.* Carter, 4 Munf. 273. See also Sibley *v.* Waffle, 16 N. Y. 180. The exemption does not extend to any casual listener. Goddard *v.* Gardner, 28 Conn. 172; State *v.* Sterrett, 68 Ia. 76; Bulman *v.* Andrews, 12

Rev. Lél. 332; Rudd *v.* Frank, 17 Ont. Rep. 758; Jackson *v.* French, 3 Wend. 357; Hoy *v.* Morris, 13 Gray, 519; Hartford Fire Ins. Co. *v.* Reynolds, 36 Mich. 502. Or to a law student. Schubkagel *v.* Dierstein, 131 Pa. St. 46. If, however, the third party stands in confidential relations to the client, the communication is still privileged. Bowers *v.* State, 29 Oh. St. 542. But see Goddard *v.* Gardner, 28 Conn. 172, *contra*. Though a third party were present, the attorney cannot state conversation without permission. Blount *v.* Kimpton, 155 Mass. 378. Does not apply to attorney acting as a gossip-monger or a messenger. Hollenback *v.* Todd, 119 Ill. 543; Ferguson *v.* McBean, 91 Cal. 63; Caldwell *v.* Davis, 10 Col. 481. Rule does not apply where one attorney represents both parties. Goodwin Co.'s App. 117 Pa. St. 514; Cady *v.* Walker, 62 Mich. 157; Gulick *v.* Gulick, 38 N. J. E. 402. Or to attorney appointed by the court. Jones *v.* State, 65 Miss. 179. Or where communication is made to one attorney to be conveyed to opposing counsel. Henderson *v.* Terry, 62 Tex. 281. Or to opposing counsel. Hall *v.* Rixey, 84 Va. 790; Tucker *v.* Finch, 66 Wis. 17. The test is, was confidence placed in the professional character. Bondy *v.* Valois, 15 R. L. 63. Such privilege may be waived by the client; but the waiver must be clear and express. Tate *v.* Tate's Exec'rs, 75 Va. 522, 533. It is not a sufficient waiver that the client has called the legal adviser as a witness in his behalf. Montgomery *v.* Pickering, 116 Mass. 227, 231. Nor that an accomplice has turned "state's evidence." State *v.* James, 34 S. C. 49. Nor that the client has taken the stand as a witness. Bigler *v.* Reyher, 43 Ind. 112; Alderman *v.* People, 4 Mich. 414; Hemenway *v.* Smith, 28 Vt. 701, 707; Barker *v.* Kuhn, 38 Ia. 392. But see Inhabitants of Woburn *v.* Henshaw, 101 Mass. 193, *contra*. It has, however, been held that a partial answer as to such communication waives the privilege *in toto*. Hartford Ins. Co. *v.* Reynolds, 36 Mich. 502. See also Hamilton *v.* People, 29 Mich. 173, 184; Gilbert *v.* Campbell, 13 New Bruns. 55. A lawyer must answer, if a party. Ethier *v.* Homier, 18 L. C. Jur. 83. It is of no consequence that the attorney practises only in the lower courts. Benedict *v.* State, 44 Oh. St. 679.

Same Subject. — The privilege applies only to information gained directly and professionally from the client himself. Crosby *v.* Berger, 11 Paige, 377; Levers *v.* Buskirk, 4 Pa. St. 309; Chillicothe, &c. Co. *v.* Jameson, 48 Ill. 281; Howard *v.* Copley, 10 La. An. 504, 505; Adams *v.* Harrison, 30 Vt. 219; State *v.* Mewherter, 46 Ia. 88, 94; Buckmaster *v.* Kelley, 15 Fla. 180; Chew *v.* Farmers' Bank, 2 Md. Ch. 231. As to who is a legal adviser, and what is sufficient to constitute the relationship, see Andrews *v.* Solomon, Pet. C. Ct. 356; Rogers *v.* Lyon, 64 Barb. 373; Randel *v.* Yates, 48 Miss. 685; Borum *v.* Fouts, 15 Ind. 50; Barnes *v.* Harris, 7 Cush. 576; Sample *v.* Frost, 10 Ia. 266; Coon *v.* Swan, 30 Vt. 6; Neal *v.* Patten, 47 Ga. 73. That a former retainer is not essential, see Orton *v.* McCord, 33 Wis. 205; Foster *v.* Hall, 12 Pick. 89; Cross *v.* Riggins, 50 Mo. 335. But see DeWolf *v.* Strader, 26 Ill. 225. The protection of the client and the legal adviser are coextensive. Hemenway *v.* Smith, 28 Vt. 701; Carnes *v.* Platt, 15 Abb. (N. Y.) Prac. N. S. 337; Bigler *v.* Reyher, 43 Ind. 112; State *v.* White, 19 Kans. 445. The client, and perhaps also the legal adviser, may be examined as to his knowledge; there can as a rule be no secrets on the stand. But the existence, nature, and scope of a professional communication are absolutely privileged from investigation. The privilege, however, does not extend to professional communications made in view of contemplated fraud, conspiracy, or other violation or invasion of law. People *v.* Blakeley, 4 Parker, C. R. 176; Graham *v.* People, 63 Barb. 468, 483. Neither does it extend to cases where the communication, though professional, is not confidential. Thus, where the legal adviser acts as mutual agent for both parties to a litigation, communications made to him are not privileged as regards the principals of this common agent, though they obviously may be so as regards third persons. Britton *v.* Lorenz, 45 N. Y. 527; Rice *v.* Rice, 14 B. Monr. 417; Chahoon *v.* Com., 21 Gratt. 822, 839. See also Brand *v.* Brand, 39 How. (N. Y.) Prac. 193, 260; Hebbard *v.* Haughian, 70 N. Y. 54.

(1) *Title Deeds.* — With regard to how far a witness or professional adviser can be compelled to produce title deeds, see 1 Greenl. Ev. § 246; Steph. Dig. Law Ev., art. 118.

(2) *Reason of Rule.* — The protection of professional communication, "having respect solely to the free and unembarrassed administration of justice, and to security in the enjoyment of civil rights, does not extend to things confidentially communicated to other

persons," even though the latter stand in important and intimate relations to the communicant. 1 Greenl. Ev. § 239. Thus it does not extend to communications made to a clergyman acting in his professional capacity. Simon *v.* Gratz, 2 Pa. Rep. 412, 417. But see Totten *v.* U. S., 92 U. S. 105, 107; Massé *v.* Robillard, 10 Rev. Lég. 527. The matter has been frequently regulated by statute, with a view to making such communications privileged. 1 Greenl. Ev. §§ 229, 247, and notes; 1 Whar. Ev. § 596. Nor does the privilege extend to physicians or other persons to whom secrets must necessarily be confided in the course of business dealing. 1 Greenl. Ev. § 248; 1 Whar. Ev. § 606; Johnson *v.* Johnson, 14 Wend. 637; Brown *v.* Carter, 9 L. C. Jur. 163; Steagald *v.* State, 22 Tex. App. 464; Heuston *v.* Simpson, 115 Ind. 62, *contra*. The matter has been frequently regulated otherwise by statute. 1 Greenl. Ev. § 248 and notes. But the statutory privilege does not extend to medical communications made with criminal intent. Hewitt *v.* Prime, 21 Wend. 79.

With the exceptions noted *supra*, which owe their origin and maintenance to an obvious public policy, there are no secrets allowable on the witness-stand with regard to relevant matters. Com. *v.* Drake, 15 Mass. 161; Simon *v.* Gratz, 2 Pa. Rep. 412; Corps *v.* Robinson, 2 Wash. C. Ct. 388; State *v.* Litchfield, 58 Me. 267. Thus secretary of telegraph company may be subpœnaed to produce telegrams. Leslie *v.* Hervey, 15 L. C. Jur. 9.

CHAPTER IX.

AUTHORITY OF RES JUDICATA.

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§ 588. The maxim, "Res judicata pro veritate accipitur" (*a*),[1] is a branch of the more general one, "Interest reipublicæ ut sit finis litium" (*b*); and the reasons which have led to the universal recognition of both are explained in the Introduction to this work.

§ 589. "Res judicata," says the Digest (*c*), "dicitur, quæ finem controversiarum pronunciatione judicis accipit: quod vel condemnatione vel absolutione contingit." But in order to have the effect of res judicata, the decision must be that of a court of competent jurisdiction, concurrent or exclusive, — "judicium à non suo judice datum, nullius est momenti" (*d*). The decisions of such tribunals are *conclusive* until reversed; but no decision is *final* unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed (*e*). Moreover, the conclusive effect is confined to the point actually decided, and does not extend to any matter which came collaterally in question (*f*). It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue (*g*).

(*a*) Introd. pt. 2, § 44.
(*b*) Introd. pt. 2, §§ 41, 43.
(*c*) Dig. lib. 42, tit. 1, l. 1.
(*d*) 10 Co. 76 b.
(*e*) 1 Ev. Poth. pt. 4, ch. 3, sect. 3, art. 1.
(*f*) Per De Grey, C. J., delivering the opinion of the Judges to the House of Lords, in the *Duchess of Kingston's case*, 11 St. Tr. 261; 1 Rol. Ab. 876; *Blackham's case*, 1 Salk. 290–291; *R.* v. *Knaptofft*, 2 B. & C. 883; *Carter* v. *James*, 13 M. & W. 137.
(*g*) *R.* v. *Hartington Middle Quarter*, 4 E. & Bl. 780, 794.

[1] For the American law, see *infra*, p. 547.

§ 590. The principle in question must not be confounded, either with the rule of law which requires records to be in writing (*h*), or with its conclusive presumption that they are correctly made (*i*). The mode of proving judicial acts is a different thing from the effect of those acts when proved; and the rules regulating the effect of res judicata would remain exactly as they are, if the decisions of our tribunals could be established by oral testimony (*k*). In truth, the record of a court of justice consists of two parts, which may be denominated respectively the *substantive* and *judicial* portions. In the former — the *substantive* portion — the court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects (*l*), nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner (*m*), — "Nemo potest contra recordum verificare per patriam" (*n*); "Quod per recordum probatum, non debet esse negatum" (*o*). In the *judicial* portion, on the contrary, the court expresses its judgment or opinion on the matter in question; and in forming that opinion it is bound to have regard only to the evidence and arguments adduced before it by the respective parties to the proceedings, — either of whom may, in most cases, appeal from such judgment to that of a superior tribunal. Such a judgment, therefore, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only res inter alios judicata; and hence the rule, that it does not bind, and is not in general evidence, against any one who was not such party or privy (*p*). Bentham, indeed, contends that res inter alios judicata ought to be admitted, and its weight estimated by the jury (*q*); but — without stopping to inquire whether the cases in which it is receivable as evidence between third parties might properly be extended — the general principle running through our law, which requires the best evidence (*r*), and

(*h*) Bk. 2, ch. 3, sect. 1, § 218.

(*i*) *Suprà*, ch. 2, sect. 2, sub-sect. 3, § 348.

(*k*) The ancient laws of Wales required in general the testimony of two witnesses, but one of the exceptions to this rule was the case of a judge respecting his judgment. "If," says the Venedotian Code, bk. 2, c. 4, § 4, "one of two parties between whom a lawsuit has taken place, deny the judgment, and the other acknowledge it, the statement of the judge is in that case final respecting his judgment." See also the Dimetian Code, bk. 2, ch. 5, § 4.

(*l*) Co. Litt. 260 a; Finch, Law, 231; Gilb. Ev. 7, 4th Ed.; 4 Co. 71 a; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

(*m*) See several instances collected, 1 Phill. Ev. 441, 10th Ed.

(*n*) 2 Inst. 380.

(*o*) Branch, Max. 186.

(*p*) 2 Smith, Lead. Cas. 661, 664 *et seq.*, 5th Ed.; per De Grey, C. J., in the *Duchess of Kingston's case*, 11 St. Tr. 261; B. N. P. 231, 232.

(*q*) 3 Benth. Jud. Ev. 431, 432.

(*r*) Bk. 1, pt. 1, §§ 87 *et seq.* and *suprà*, § 292.

rejects all evidence where there is no reasonable and proximate connection between the principal and evidentiary facts (*s*), is quite as applicable to res judicata as to any other species of proof.

§ 591. But the judgment of a tribunal of competent jurisdiction may be null and void in itself in respect of what is contained in it (*t*). 1. When the object of the decision it pronounces is uncertain, — "Sententia debet esse certa," — *e. g.*, a judgment condemning the defendant to pay the plaintiff what he owes him would be void; though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and the cause of demand appeared on the record of the proceedings (*u*). 2. When the object of the adjudication is anything impossible (*x*), — "Lex non cogit impossibilia" (*y*). 3. When a judgment pronounces anything which is expressly contrary to the law; *i. e.*, if it declares that the law ought not to be observed: if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal (*z*). 4. When a judgment contains inconsistent and contradictory dispositions (*a*). 5. When a judgment pronounces on what is not in demand (*b*), — "Judex non reddit plus, quàm quod petens ipse requirit," and "Droit ne done pluis que soit demande" (*c*).

The same principles apply to other things which partake of the nature of judgments. Thus a verdict that finds matter uncertainly or ambiguously is insufficient (*d*); and the same holds when it is inconsistent (*e*). In the 11 Hen. IV. 2 A. pl. 3, on the trial of a writ of conspiracy against two, the jury found one guilty and the other not; whereupon the presiding judge said to them, "Vous gents, vr̃e verdit est contrariant en luy m̃, car si l'un ne soit my culp̃, ambid̃ sont de rien culp̃, p̃ c̃ q̃ le br̃e supp̃ q̃ ils conspir̃ ensemble, chesc̃ ove aut̃, mes pur ce que vous n'estes appritz de ley, soit melior aviz̃ de vr̃e verdit, &c." So if a verdict pronounces on what is not in issue (*f*). A verdict concluding against law is void (*g*), but when a jury find matter of fact, and conclude against law, the verdict is good and the conclusion ill (*h*). And, lastly, of awards. It is a principle that

(*s*) Bk. 1, pt. 1, §§ 88, 90.

(*t*) 1 Ev. Poth. pt. 4, ch. 3, sect. 3, art. 2, § 1, n. 18. See also per Parke, B., in R. v. *Blakemore*, 2 Den. C. C. 420, 421.

(*u*) 1 Ev. Poth. *in loc. cit.*

(*x*) *Id.* n. 21.

(*y*) Hob. 96.

(*z*) 1 Ev. Poth. *in loc. cit.* n. 22.

(*a*) *Id.* n. 23; *Cooper* v. *Lungdon*, 10 M. & W. 785.

(*b*) 1 Ev. Poth. *in loc. cit.* n. 24.

(*c*) 2 Inst. 286.

(*d*) Co. Litt. 227 a.

(*e*) 48 Edw. III. 25 a; Hob. 262.

(*f*) 1 Leon. 67, pl. 86; Hob. 53; 1 Rol. 257.

(*g*) 22 Ass. pl. 60; 28 *Id.* pl. 4; Hob 112, 113.

(*h*) Plowd. 114; Dy. 106 b, pl. 20; 194 a, pl. 32; Jenk. Cent. 1, Cas. 35; 4 Mod. 10.

awards must be certain (*i*); and if an award contains inconsistent provisions (*k*), or directs what is impossible (*l*), or what is illegal (*m*), it cannot be enforced by action, and may be set aside on motion.

§ 592. "Cum quæritur," again to quote from the Digest (*n*), "hæc exceptio" (scil. rei judicatæ), "noceat, necne? inspiciendum est, an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi, et eadem conditio personarum: quæ nisi omnia concurrent, alia res est." First, then, in order to exclude a party whose demand has been dismissed, from making a fresh demand, on the ground that the matter is *res judicata*, the *thing* demanded must be the same. But this must not be understood too literally. For instance, although the flock which the plaintiff demands now does not consist of the same sheep as it did at the time of the former demand, the demand is held to be for the same thing, and therefore is not receivable (*o*). And so a party is held to demand the *same thing*, when he demands anything which forms a part of it (*p*). But secondly, in order that the maxim, *res judicata*, shall apply, there must be "eadem conditio personarum." And therefore, as we have seen, if the *person* whom it is sought to affect by a judgment was neither party nor privy to the proceedings in which it was given, it is not in general even receivable in evidence against him (*q*). So a judgment against a party in a criminal case is not evidence against him in a civil suit, even of the fact on which the conviction must have proceeded (*r*). Nor is a judgment of acquittal evidence in his favour (*s*); for the parties are not the same. So, in an appeal of murder, the indictment was not evidence against the defendant (*t*). And so on an indictment against A., for perjury committed by him on the trial of an indictment against B; the record of the proceedings at that trial, with the finding of the jury, and the judgment of the court, pronounced thereon in accordance with the evidence then given by A., is no defence (*u*).

(*i*) Watson, Awards, 204, 3rd Ed.; Russ. Arbitr. 275, 3rd Ed.

(*k*) *Id.* 289.

(*l*) *Id.* 288; Wats. Awards, 234, 3rd Ed.

(*m*) Russ. Arb. 391, 3rd Ed.; Wats. Awards, 234, 3rd Ed.

(*n*) Dig. lib. 44, tit. 2, ll. 12, 13, 14. See also 1 Ev. Poth. pt. 4, ch. 3, sect. 3, art. 4, n. 40; Bonnier, Traité des Preuves, § 683; Code Civil, liv. 3, tit. 3, ch. 6, sect. 3.

(*o*) 1 Ev. Poth. 552.

(*p*) *Id.*

(*q*) *Suprà*, § 590. In the U. S. A. judgment in a suit upon joint and several note in favour of one surety will not bar suit against another, unless the defence in the first was an extinguishment of the cause of action, or unless the defences are identical. Morgan's Best, 559, citing *Hill* v. *Morse*, 61 Me. 541.

(*r*) Per Blackburn, J., delivering the opinion of the Judges (in Dom. Proc.), in *Castrique* v. *Imrie*, L. Rep., 4 Ap. Ca. 414, 434. See Tayl. Ev. § 1505; Stark. Ev. 361, 4th Ed.; 2 Phill. Ev. 27, 10th Ed.

(*s*) Tayl. Ev. § 1505; Stark. Ev. 332, 4th Ed. "Acta facta in causâ civili, non probant in judicio criminali." Masc. de Prob. Concl. 34, n. 1.

(*t*) *Samson* v. *Yardly*, 2 Keb. 223.

(*u*) Hob. 201; *Titus Oates' case*, 10 How. St. Tr. 1136, 1137.

§ 593. An important exception to this rule exists in the case of judgment *in rem; i. e.*, adjudications pronounced upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose (*x*). Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world. At the head of these stand judgments in the Exchequer, of condemnation of property as forfeited, adjudications of a Court of Admiralty on the subject of prize, &c. In certain instances, also, judgments as to the status or condition of a party are receivable in evidence against third persons, although they are not conclusive. Thus, in an action against an executor sued on a bond of his testator, a commission finding the testator lunatic at the time of the execution of the bond is primâ facie evidence against the plaintiff though he was no party to it (*y*). And by analogy to the general rule of res inter alios acta, judgments and judicial proceedings inter alios are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from (*z*). Judgments not *in rem* are said to be judgments *in personam* (*a*).

§ 594. Conclusive judgments are a species of estoppels, seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. There is certainly this difference, that estoppels are usually founded on the voluntary act of a party; whereas it is a præsumptio juris that "judicium redditur in invitum" (*b*). Moreover, when judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force, "quia transit in rem judicatam" (*c*). Like other estoppels by matter of record, and estoppels by deed, judgments, in order to have a conclusive effect,

(*x*) The authority of the tribunal in such cases is said to rest on the following grounds; viz.: 1st, that the subject-matter should be within the lawful control of the state, under the authority of which the tribunal sits; 2nd, that the sovereign authority of that state should have conferred on the tribunal jurisdiction to decide as to the disposition of the thing; and, 3rd, that the tribunal should act within its jurisdiction. Per Blackburn, J., *Castrique* v. *Imrie*, L. Rep., 4 Ap. Ca. 414, 429.

(*y*) *Faulder* v. *Silk*, 3 Campb. 126; *Dane* v. *Lady Kirkwall*, 3 C. & P. 683.

(*z*) *Suprà*, ch. 5, § 510.

(*a*) The classification of judgments into those *in rem* and those *in personam* has been recognised by statute, 24 & 25 Vict. c. 10, s. 35.

(*b*) Co. Litt. 248 b; 5 Co. 28 b; 10 *Id.* 94 b. According to some foreign jurists, judgments partake of the nature of contracts. "Cette importante présomption (autorité de la chose jugée) se rattachant au fond du droit, autant qu'à la preuve, les règles sur l'effet des jugements, c'est à dire sur les personnes et sur les objets auxquels elle s'applique, reposent sur les mêmes bases que les règles sur l'effet des conventions. On l'a souvent dit avec raison, *judiciis contrahimus.*" Bonnier, Traité des Preuves. § 680.

(*c*) Pollexf. 641. See also 6 Co. 46 a.

must be pleaded if there be opportunity, otherwise they are only cogent evidence for the jury (*d*).

§ 595. The general maxims of law, "Dolus et fraus nemini patrocinentur" (*e*), "Jus et fraus nunquam cohabitant" (*f*), "Qui fraudem fit frustrà agit" (*g*), apply to the decisions of tribunals (*h*). Lord Chief Justice de Grey, in delivering the answer of the judges to the House of Lords in the *Duchess of Kingston's case* (*i*), speaking of a certain sentence of a spiritual court, says: "If it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the court was *mistaken*, it may be shown that they were *misled*. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." In such cases, as has been well expressed, the whole proceeding was "fabula, non judicium" (*k*). And this principle applies to every species of judgment: to judgments of courts of exclusive jurisdiction (*l*); to judgments in rem (*m*); to judgments of foreign tribunals (*n*), and even to judgments of the House of Lords (*o*).

It is perhaps needless to add that a supposed judicial record offered in evidence may be shown to be a forgery (*p*).

(*d*) 2 Smith, Lead. Cas. 670, 673, 5th Ed.; and *suprà*, ch. 7, sect. 2, § 544.

(*e*) 14 Hen. VIII. 8 a; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

(*f*) 10 Co. 45 a.

(*g*) 2 Rol. 17.

(*h*) 3 Co. 78 a; *The Duchess of Kingston's case*, 11 St. Tr. 262; *Brownsword* v. *Edwards*, 2 Vez. 246; *Earl of Bandon* v. *Becher*, 3 Cl. & F. 479; *Harrison* v. *The Mayor of Southampton*, 4 De G., M. & G. 148.

(*i*) 11 St. Tr. 262.

(*k*) 4 De G., M. & G. 148. See Macqueen, Law of Marriage, Divorce, and Legitimacy, 2nd Ed., p. 68.

(*l*) *Meddowcraft* v. *Hugenin*, 3 Curt. 403.

(*m*) *In re Place*, 8 Exch. 704, per Parke, B.

(*n*) *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

(*o*) *Shedden* v. *Patrick*, 1 Macq. Ho. Lo. Cas. 535.

(*p*) *Noell* v. *Wells*, 1 Sid. 359.

AMERICAN NOTES.

(§ 588) JUDGMENTS. — (*a*) *Definition.* — By the term "judgment" is understood the "final judgment, order, or decree of any court." See Steph. Dig. Ev., art. 39; 1 Greenl. Ev. §§ 522–551; Webb *v.* Buckelew, 82 N. Y. 555; Jamaica *v.* Chandler, 121 Mass. 1. That such judgment is voidable by a court of appellate jurisdiction does not affect the definition. Connolly *v.* Connolly, 32 Gratt. 657, 664; Wadhams *v.* Gay, 73 Ill. 415.

(*b*) *Conclusive as to Legal Effect.* — All judgments of whatever nature are conclusive proof as against all persons of the matters therein stated as distinguished from the matters thereby decided. In other words, every judgment is conclusively assumed to be a true statement of the facts and judicial transactions it records. So a judgment is conclusive proof of its own rendition, as stated. Chamberlain *v.* Carlisle, 26 N. H. 540;

Key *v.* Dent, 14 Md. 86; Thomas *et al. v.* Hinkle, 35 Ark. 450; Floyd *v.* Ritter, 56 Ala. 356; Thompson *v.* Building Assoc., 23 Kans. 209; Spencer *v.* Dearth, 43 Vt. 98, 105; Farmers' Bank *v.* R. R., 72 N. Y. 188; Lee *v.* Lee, 21 Mo. 531; Faulcon *v.* Johnston, 102 N. C. 264; Dorrell *v.* State, 83 Ind. 357; Carney *v.* Carney, 95 Mo. 353; Harrington *v.* Wadsworth, 63 N. H. 400; Com. *v.* O'Brien, 152 Mass. 495; Ferguson *v.* Teel, 82 Va. 690. See also Vogt *v.* Ticknor, 48 N. H. 242; Goodnow *v.* Smith, 97 Mass. 69. So of the probate of a will. Mut. Ben. Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 243. The minute-book of a Court of Chancery is the evidence of its doings in the absence of an extended record. Thaw *v.* Ritchie, 136 U. S. 519. The record, however, is subject to amendment by the court upon proper cause shown. Balch *v.* Shaw, 7 Cush. 282; Willard *v.* Whitney, 49 Me. 235.

(*c*) *Judgments as Proof of Matters decided.* — The probative force of a judgment considered as proof of the matters thereby decided varies as such judgment is, — I. A judgment *in rem;* or, II. A judgment *in personam.*

I. *Judgments in Rem.* — Speaking generally, judgments *in rem* decide and determine a *status,* or make a final and conclusive transfer or disposition of property. State *v.* R. R., 10 Nev. 47. Thus, the judgments of a court of admiralty, decreeing prize, bottomry, salvage, forfeiture, and the like, are judgments *in rem.* The Mary, 9 Cranch, 126, 142–146; Magoun *v.* New Eng. Ins. Co., 1 Story, 157; The Cuba, 2 Hughes (U. S.), 489; The Mary Celeste, 2 Lowell, 354; The Slavers, 2 Wall. 383. See also Dunham *v.* Ins. Co., 1 Lowell, 253. So of a decree of divorce. See Story, Conf. Laws, §§ 200–230, 597; Cooley, Const. Limit. *400 *et seq.;* Hood *v.* Hood, 110 Mass. 463; Kinnier *v.* Kinnier, 45 N. Y. 535, 540; Cheever *v.* Wilson, 9 Wall. 108; Ditson *v.* Ditson, 4 R. I. 87. Compare Gill *v.* Read, 5 R. I. 343. So of probate decrees and appointments. Tompkins *v.* Tompkins, 1 Story, 547; Schroyer *v.* Richmond, 16 Oh. St. 455; Grignon *v.* Astor, 2 How. 319, 338; Connolly *v.* Connolly, 32 Gratt. 657, 664; Nelson *v.* Boynton, 54 Ala. 368, 376; Merriam *v.* Sewall, 8 Gray, 316, 327; Williams *v* Saunders, 5 Cold. 60. See also Lancaster's Appeal, 47 Conn. 248. So of a decree declaring pedigree. Ennis *v.* Smith, 14 How. 400, 430.

Effect of Judgments in Rem. — A judgment *in rem* is conclusive proof as against all persons whatever, whether parties, privies, or strangers to the case, of all facts in issue and all facts which must have been assumed true to warrant rendition of the judgment.

II. *Judgments in Personam.* — A judgment *in personam* is conclusive proof, as between parties and privies thereto, of all facts directly in issue in the case actually adjudicated by the court, and all facts upon which the judgment was or necessarily appears to have been based. Tebbetts *v.* Tilton, 31 N. H. 273, 284; Morse *v.* Stockman, 73 Wis. 89; Franklin Co. *v.* German Savings Bank, 142 U. S. 93; Young *v.* Brehe, 19 Nev. 379; Cauhape *v.* Parke, 121 N. Y. 152; Sanderson *v.* Peabody, 58 N. H. 116; Coulter *v.* Davis, 13 Lea, 451; Gerrish *v.* Bragg, 55 Vt. 329; School District *v.* Stocker, 42 N. J. L. 115; Dunham *v.* Bower, 77 N. Y. 76; Gilbreath *v.* Jones, 66 Ala. 129; Wood *v.* Ensel, 63 Mo. 193; Collins *v.* Jennings, 42 Ia. 447; Morse *v.* Elms, 131 Mass. 151; Porter *v.* Warner, 36 Oh. St. 471; Cook *v.* Burnley, 45 Tex. 97; Hardy *v.* Mills, 35 Wis. 141; Hamner *v.* Pounds, 57 Ala. 348; Supples *v.* Cannon, 44 Conn. 424; Spencer *v.* Dearth, 43 Vt. 98. Issue may be shown by parol, Wither *v.* Sims, 80 Va. 651. For some consideration of the criminal counterpart of the rule above stated, see Bishop, Crim. Law, §§ 808–831.

Provided, (1) that the subject, the issue, and the grounds and means of legal defence are substantially the same in the suit where the judgment is offered as in that in which it was rendered. Clagett *v.* Easterday, 42 Md. 617, 627; Giraldin *v.* Dean, 49 Tex. 243; Dyer *v.* Goran, 29 Ia. 126; Foye *v.* Patch, 132 Mass. 105; Beckwith *v.* Thompson, 18 W. Va. 103, 119; Washington, &c. Co. *v.* Sickles, 24 How. 333; Morgan *v.* Burr, 58 N. H. 470. That new facts in avoidance may in certain contingencies be used in subsequent actions, see Cromwell *v.* County of Sac, 94 U. S. 351, 356; Hanham *v.* Sherman, 114 Mass. 19. It is, however, essential to the application of the rule relating to the conclusiveness of judgments that the facts upon which such judgment is a final decision should have been fully litigated by the parties. Wells *v.* Moore, 49 Mo. 229; Lamb *v.* Gatlin, 2 Dev. & Bat. Eq. 37; Haldeman *v.* U. S., 91 U. S. 584; Wadhams *v.* Gay, 73 Ill. 415;

Morton *v.* Sweetzer, 12 All. 134; McFarlane *v.* Cushman, 21 Wis. 401; Haws *v.* Tiernan, 53 Pa. St. 192; Houston *v.* Musgrove, 35 Tex. 594; Stowell *v.* Chamberlain, 60 N. Y. 272. But see, *contra*, to the effect that an agreed judgment is equally conclusive upon parties and those identified with them in legal interest, Chamberlain *v.* Preble, 11 All. 370; Dunn *v.* Pipes, 20 La. An. 276; Jarboe *v.* Smith, 10 B. Monr. 257; Fletcher *v.* Holmes, 25 Ind. 458; Brown *v.* Sprague, 5 Denio, 545. So a confessed judgment is binding. Nesbaum *v.* Keim, 24 N. Y. 325; Twogood *v.* Pence, 22 Ia. 543; Secrist *v.* Zimmerman, 55 Pa. St. 446. See also Hotel Assoc. *v.* Parker, 58 Mo. 327. A person is only bound in the character in which he is sued. Lord *v.* Wilcox, 99 Ind. 491. But the arrangement of parties on the record is not material. Parkhurst *v.* Berdell, 110 N. Y. 386. But see Gulf, &c. R. R. *v.* R. R., 83 Tex. 509. And *provided*, (2) that any judgment in the nature of a formal admission by a party may, at all times, be given in evidence as against such party. Parsons *v.* Copeland, 33 Me. 370; Wells *v.* Compton, 3 Rob. (La.) 171; Kellenberger *v.* Sturtevant, 7 Cush. 465. That judgments *in personam* are not conclusive evidence as between strangers to the record, or between a stranger and a party or privy thereto, see Corbley *v.* Wilson, 71 Ill. 209; McBee *v.* Fulton, 47 Md. 403; Raymond *v.* Richmond, 78 N. Y. 351; Hine *v.* R. R., 42 Ia. 636. See also Betts *v.* New Hartford, 25 Conn. 180; Hutchinson *v.* Bank, 41 Pa. St. 42; Elliott *v.* Frakes, 71 Ind. 412; Corcoran *v.* Canal Co., 94 U. S. 741.

Same Subject. — It is, however, necessary that the suit be litigated, as has been said *supra*, substantially upon its merits. Chesnutt *v.* Frazier, 6 Baxter, 217; Ford *v.* Doyle, 44 Cal. 635. For the reciprocal relation of law and equity tribunals in this connection, see Cramer *v.* Moore, 36 Oh. St. 347; Bryan *v.* Kennett, 113 U. S. 179; Wright *v.* Deklyne, 1 Pet. C. Ct. 199; Hendrickson *v.* Norcross, 19 N. J. Eq. 417; Baldwin *v.* McCrea, 38 Ga. 650; Tilson *v.* Davis, 32 Gratt. 92, 104; Durant *v.* Essex Co., 7 Wall. 107. The test, it has been said, with regard to the conclusive nature of a former judgment in a subsequent suit is determined by the consideration. Would substantially the same evidence sustain both, — the demand not being apportionable in its nature? Norton *v.* Doherty, 3 Gray, 372; Ware *v.* Percival, 61 Me. 391; Dawley *v.* Brown, 79 N. Y. 390; Riker *v.* Hooper, 35 Vt. 457; Cannon *v.* Brame, 45 Ala. 262. But see Burritt *v.* Belfy, 47 Conn. 323. Such judgment is equally conclusive whether pleaded as an estoppel or given in evidence. Kilheffer *v.* Herr, 17 S. & R. 319, 325; Betts *v.* Starr, 5 Conn. 550; Thompson *v.* Roberts, 24 How. 233; Cavanaugh *v.* Buehler, 120 Pa. St. 441; Hamner *v.* Pounds, 57 Ala. 348; Krekeler *v.* Ritter, 62 N. Y. 372. In certain States it has been held that the *estoppel* of judgment must be specially pleaded. Krekeler *v.* Ritter, 62 N. Y. 372. See also Clink *v.* Thurston, 47 Cal. 21; Perkins *v.* Walker, 19 Vt. 144; Morgan *v.* Burr, 58 N. H. 470, to the effect that an estoppel should, if possible, be pleaded in bar. As to who are considered privies, conf. § 519, n. 1, *supra;* Finney *v.* Boyd, 26 Wis. 366; Stoddard *v.* Thompson, 31 Ia. 80; Kelly *v.* Donlin, 70 Ill. 378; Chant *v.* Reynold, 49 Cal. 213; Littleton *v.* Richardson, 34 N. H. 179; Harvie *v.* Turner, 46 Mo. 444.

(*d*) *Interstate Judgments.* — The constitutional provision (U. S. Const., art. iv. § 1), "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," gives the judgment of another State the evidentiary effect of a domestic judgment. Christmas *v.* Russell, 5 Wall. 290; Child *v.* Powder Works, 45 N. H. 547; North Bank *v.* Brown, 50 Me. 214; State *v.* Helmer, 21 Ia. 370; Conway *v.* Ellison, 14 Ark. 360; Rogers *v.* Burns, 27 Pa. St. 525; Chew *v.* Brumagim, 21 N. J. Eq. 520; Hall *v.* Winchell, 38 Vt. 588; Kerr *v.* Kerr, 41 N. Y. 272; Lawrence *v.* Jarvis, 32 Ill. 304. See also Wright *v.* Andrews, 130 Mass. 149; Harshey *v.* Blackmarr, 20 Ia. 161. An excellent statement of the law on this subject is given in Huntington *v.* Attrill, 146 U. S. 657, 685.

(*e*) *Foreign Judgments.* — A consideration of the instances in which the courts of one country will, by international comity or otherwise, give effect to judgments by the courts of another, seems more properly to fall within the scope of international law. See Story, Confl. Laws, §§ 532, 545, 551, 584, 586, 591, 592, 593, 597 *et seq.;* 2 Kent Comm. 120, 121, and notes. When, however, such foreign judgment *in rem* or *in personam* is recognized as binding by a domestic tribunal, it is considered to have the same conclusive effect, to the same extent, and between the same persons, as a domestic judgment of the same class. Woodruff *v.* Tayler, 20 Vt. 65. But see Coit *v.* Haven, 30 Conn. 190, 197. The point,

however, cannot be regarded as entirely settled, certain cases giving only a *prima facie* validity to a foreign judgment *in personam*. Story, Confl. Laws, § 607.

Proviso. — *Provided*, that in case of all judgments, either collaterally or on direct proceedings, it may be shown, — (1) that the court rendering such judgment had no jurisdiction of the subject-matter. Knowles *v.* Gaslight Co., 19 Wall. 58; Child *v.* Powder Works, 45 N. H. 547; Pelton *v.* Platner, 13 Ohio, 209; Gilman *v.* Gilman, 126 Mass. 26. But see Lapham *v.* Briggs, 27 Vt. 26. So of judgments *in rem*. McKeever *v.* Ball, 71 Ind. 398; Tyler *v.* Defrees, 11 Wall. 331; Shroyer *v.* Richmond, 16 Oh. St. 455; Noble *v.* Oil Co., 79 Pa. St. 354. (2) Or of the *parties*. State *v.* Fleak, 54 Ia. 429; Easterly *v.* Goodwin, 35 Conn. 273; Napton *v.* Leaton, 71 Mo. 358; Hill *v.* Mendenhall, 21 Wall. 453; Penobscot R. R. *v.* Weeks, 52 Me. 456; Needham *v.* Thayer, 147 Mass. 536; Gay *v.* Smith, 38 N. H. 171; Parish *v.* Parish, 32 Ga. 653; Price *v.* Ward, 25 N. J. L. 225; Hanson *v.* Wolcott, 19 Kans. 207. Unless indeed the judgment itself recite matters which establish or confer jurisdiction. Wyatt *v.* Rambo, 29 Ala. 510; Penobscot R. R. *v.* Weeks, 52 Me. 456; Coit *v.* Haven, 30 Conn. 190, 197; McCauley *v.* Fulton, 44 Cal. 355; Smith *v.* Wood, 37 Tex. 616. Such recitals will probably bind domestic tribunals, and forbid a collateral attack. Wilcher *v.* Robertson, 78 Va. 616. But it is also said that recitals are conclusive as to jurisdiction in interstate judgments. Thompson *v.* Emmert, 4 McLean, 96; Pritchett *v.* Clark, 4 Harr. (Del.) 280; Westcott *v.* Brown, 13 Ind. 83; Lapham *v.* Briggs, 27 Vt. 26. See also Thorn *v.* Salmonson, 37 Kans. 441. But see for strong dicta and decisions, *contra*, *i. e.*, that jurisdiction is only *prima facie* established by the recitals, Comstock *v.* Crawford, 3 Wall. 396; Carleton *v.* Bickford, 13 Gray, 591; Norwood *v.* Cobb, 24 Tex. 551; Lawrence *v.* Jarvis, 32 Ill. 304, 310; Rape *v.* Heaton, 9 Wis. 328; Ferguson *v.* Crawford, 70 N. Y. 253; Price *v.* Ward, 25 N. J. L. 225; Pennoyer *v.* Neff, 95 U. S. 714, 730. (3) Or that the judgment is tainted with fraud or collusion. School District *v.* Schreiner, 46 Ia. 172; Mut. Ben. Life Ins. Co. *v.* Tisdale, 91 U. S. 238, 242; Hartman *v.* Ogborn, 54 Pa. St. 120; Tebbetts *v.* Tilton, 31 N. H. 273, 286; State *v.* Brown, 16 Conn. 54; Ellis *v.* Kelly, 8 Bush (Ky.), 621; State *v.* Cole, 48 Mo. 70. But see Christmas *v.* Russell, 5 Wall. 290, 305; Krekeler *v.* Ritter, 62 N. Y. 372, *contra*. Domestic judgments are not to be impeached collaterally. Harris *v.* McClanahan, 11 Lea, 181; Mussey *v.* White, 58 Vt. 45; Spotts *v.* Com., 85 Va. 531. But see Hardy *v.* Beaty, 84 Tex. 562. That on direct proceedings, the same facts can be shown as would vacate an interstate or foreign judgment on collateral attack, see Carleton *v.* Bickford, 13 Gray, 591; Thompson *v.* Whitman, 18 Wall. 457; Needham *v.* Thayer, 147 Mass. 536.

Presumptions as to Jurisdiction. — It is said the jurisdiction of a court of general jurisdiction will be presumed. Folger *v.* Columbian Ins. Co., 99 Mass. 267, 273; Jarvis *v.* Robinson, 21 Wis. 523; Haywood *v.* Collins, 60 Ill. 328; Hahn *v.* Kelly, 34 Cal. 391; Wingate *v.* Haywood, 40 N. H. 437; Hendrick *v.* Whittemore, 105 Mass. 23. As to how far the jurisdiction of a foreign or inferior tribunal will be assumed, see Goulding *v.* Clark, 34 N. H. 148; State *v.* Hinchman, 27 Pa. St. 479; Rowley *v.* Howard, 23 Cal. 401; Crawford *v.* Howard, 30 Me. 422; Lewis *v.* Allred, 57 Ala. 628; Secombe *v.* R. R. Co., 23 Wall. 108; Shufeldt *v.* Buckley, 45 Ill. 223.

(*f*) *Legal Consequences of Judgments.* — Consideration of the consequences to parties and privies flowing from any judgment, civil or criminal, after such judgment has been duly proved, seems outside the scope of this work. See 1 Greenl. Ev. §§ 533, 537, n. 1.

CHAPTER X.

PLURALITY OF WITNESSES.

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§ 596. The last subject that offers itself to our attention in this part of the work is the *quantity* of legitimate evidence required for judicial decision.[1] This is governed by a rule of a negative kind, which, in times past at least, was almost peculiar to the common law of England (*a*); namely, that in general no particular number of instruments of evidence is necessary for proof or disproof, — the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases (*b*). And as a corollary from this, when there is conflicting evidence, the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may, in many cases, be more trustworthy than the opposing testimony of many (*c*). The rule has been expressed "ponderantur testes, non numerantur" (*d*); but "testi-

(*a*) The Hindu law seems the reverse of ours: where the testimony of a single witness is sufficient it is the exception, not the rule. See Translation of Pootee, c. 3, sect. 8, in Halhed's Code of Gentoo Laws.

(*b*) 3 Blackst. Comm. 370; Stark. Evid. 827, 4th Ed.; Trials per Pais, 363; Peake's Ev. 9, 5th Ed.; Co. Litt. 6 b; Fost. C. L. 233; 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2.

(*c*) Stark. Evid. 832, 4th Ed.

(*d*) *Id.*

[1] The American law on this subject is given, *infra*, p. 569.

monia" or "probationes" would be better than "testes," as it is clearly not confined to verbal evidence (*e*).

§ 597. We have said that this rule is a distinguishing feature in our common-law system. The Mosaic law in some cases (*f*), and the civilians and canonists in all (*g*), exacted the evidence of more than one witness, — a doctrine adopted by most nations of Europe, and by the ecclesiastical and some other tribunals among us. As might naturally be expected, much has been said and written, and the most opposite views have prevailed, on the merits of the different systems. Those who take the civil-law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness, since by this means any person, even the most vile, can swear away the liberty, honour, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked; and some of them endeavour to place the matter on a jure divino foundation, by contending that the rule requiring two witnesses is laid down in Scripture (*h*). On this, Serjeant Hawkins (*i*) very judiciously observes, that the passages in the Old Testament which speak of requiring two witnesses "concern only the judicial part of the Jewish law, which, being framed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential rules for the direction of the government of the Church, in matters introduced by the Gospel, and no way control the civil constitution of countries." It may be questioned also whether the passages cited in support of the dogma really bear it out, when considered in themselves, apart from traditions and glosses (*k*).

(*e*) "Testimonia ponderanda sunt, non numeranda," is found in the Scotch law authorities. Halk. Max. 174; Ersk. Inst. bk. 4, tit. 2, § 26.

(*f*) See the next note.

(*g*) Their maxim — sometimes shortly called "the rule of unus nullus" — is well-known, "Unius omninò testis responsio non audiatur, etiamsi præclaræ curiæ honore præfulgeat." Cod. lib. 4, tit. 20, l. 9, § 1. See also *Id.* l. 4; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 18; Decretal. Gregor. IX. lib. 2, tit. 20, c. 23; and *suprà*, Introd. pt. 2, §§ 66 *et seq.* Bonnier, in his Traité des Preuves, § 201, labours hard, and apparently with success, to show that the lawyers of ancient Rome did not establish this rule, which he considers the production of the lower empire. The French author is not peculiar in this view; the same notion as to the origin of the rule requiring two witnesses having been advanced long before his time. See Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 2; and *suprà*, Introd. pt. 2, § 66.

(*h*) The civilians and canonists, Mascard. de Prob. quæst. 5, n. 10; Decretal. Gregor. IX. lib. 2, tit. 20, cap. 23, &c.; and, there is reason to believe, our old lawyers, Fortesc. cc. 31, 32; 3 Inst. 26; Plowd. 8; argument in *R.* v. *Vaughan*, 13 How. St. Tr. 535; and their contemporaries, — see Waterhouse, Comm. on Fortesc. pp. 402, 403, and *Sir Walter Raleigh's case*, 2 How. St. Tr. 15, — fancied that they saw in Scripture a divine command, to require the testimony of more than one witness *in all judicial proceedings*.

(*i*) 2 P. C. c. 25, s. 131.

(*k*) The text of the Mosaic code on this subject will be found in Numb. xxxv. 30, Deut. xvii. 6, and Deut. xix. 15; the first

Nothing in the Old Testament, that we are aware of, gives the remotest intimation that two witnesses were required in *civil* cases in general; and there are some passages which seem indirectly to show the reverse (*l*).

The passages in the New Testament which were cited, or more properly speaking tortured, to bear out the dogma requiring a plurality of witnesses *in all cases*, are Matt. xviii. 15, 16; John, viii. 17; 2 Cor. xiii. 1; 1 Tim. v. 19; Heb. x. 28; but principally the first, respecting which the text of the Decretal runs thus: "Quia non est licitum alicui Christiano, et multò minùs crucis Christi inimico, ut causæ suæ unius tantùm quasi legitimo testimonio finem imponat: Mandamus, quatenus si inter vos et quoscunque Judæos emerserit quæstio, in qualibet causâ Christiani, et maxime clerici, non minus quàm duorum vel trium *virorum*, qui sint probatæ vitæ et fidelis conversationis, testimonium admittatis, juxta illud Dominicum. *In ore duorum vel trium testium stat omne verbum.* Quia licèt quædam sint causæ, quæ plures, quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur" (*m*). The passage on which so much stress is here laid is thus given in the Church of England version of the New Testament, which agrees in substance with the Vulgate: "If thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii. 15, 16. Now, besides the answer already given from Serjt. Hawkins, it might be sufficient to observe on this passage, that the case put in it is clearly a case of *preappointed* evidence, the marked difference between which and *casual* evidence has been already pointed out (*n*), so that, even supposing the command to affect municipal law at all, the applying it to every case, civil or criminal, is an unwarrantable extension of the text. But there is another answer, more complete and satisfactory, because applicable to most of the other passages as well as to this. Assuming that the passage, "In the mouth of two or three witnesses every word may be established,"

two of which prohibit *capital* punishment unless on the testimony of at least two witnesses, and the last directs that "one witness shall not rise up against a man for any iniquity, or for any sin, that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." In the case also of preappointed evidence by deeds, agreements, &c., it seems to have been customary among the Jews, as among ourselves, to secure the testimony of more than one witness (see Isaiah, viii. 2; Jer. xxxii. 10–13).

(*l*) Thus when Moses speaks of civil trespasses, in Exod. xxii. 9, he says nothing about any number of witnesses, and compare Exod. xxii. 10–13, and Ruth, iv. 7.

(*m*) Decretal. Gregor. IX. lib. 2, tit. 20, c. 23. See also c. 4.

(*n*) *Supra*, Introd. pt. 1, § 31, and pt. 2, § 60.

is to be understood as recognising the binding authority of the Mosaic law with respect to witnesses, the principle of that law, as already shown, was to require more than a single witness in those cases only where condemnation would be followed by very serious punishment; and it appears from the following verse of the chapter under consideration, that disobedience to the remonstrance there directed to be made would be the foundation of further proceedings, ending in the total excommunication of the offending party. The next three passages may be explained in a similar way; as they all relate to matters where the gravest consequences would follow disobedience, after certain acts had been evidenced in the manner therein stated.

Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is intrusted to a single judge, or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury; but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are usually corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanour of the accused while on his trial; for the observation of Beccaria must not be forgotten, — "imperfect proofs, from which the accused might clear himself, and does not, become perfect" (*o*). Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecution, oppression, or fraud, and in certain cases of preappointed evidence (where parties about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act), the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness (*p*).

Cases, too, must now and then, though extremely seldom, occur, in which the grossest injustice is done by giving credence to the story of a single witness. A remarkable instance of this is afforded

(*o*) Beccaria, Dei Delitti et delle Pene, § 7. See also per Abbott, C. J., in *R.* v. *Burdett*, 4 B. & A. 161, 162.

(*p*) See *infrà*.

by the case of one Brooks in 1880. Brooks mutilated himself, whether from insanity or malice is not quite clear, but more probably the former, and stated that his injuries had been inflicted by four men. Two he identified, and they were convicted and sentenced to ten years' penal servitude at the Staffordshire Assizes upon his evidence alone. About two years afterwards, and shortly before his death, Brooks confessed his crime, and the men received a free pardon. That a case of this kind should give rise to a demand for the introduction of the "unus nullus rule" into our law is not to be wondered at (*q*).

§ 598. On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a *casual* nature; above all, where, being in violation of law, as much clandestinity as possible would be observed, — it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty: by telling the murderer and felon that they may exercise their trade, and the knave that he may practise his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to react on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight (*r*).

§ 599. But whether the common-law rule had its origin in these considerations is doubtful. Our old lawyers do not seem to have been emancipated from the civil and canon law notion, that two witnesses ought to be required in all cases, based as this notion was then supposed to be, on the authority of Scripture, and fortified by the practice of the Church (*s*). But as in those times the jury were themselves a species of witnesses, and might, if they chose to run the risk of an attaint, find a verdict without any evidence being produced before them (*t*), our ancestors considered that a judgment founded on the verdict of twelve men was a virtual compliance with what they deemed a divine command. One strong proof of this is, that where

(*q*) See a letter of Sir George Bowyer in the "Times" newspaper of January 20th, 1882, shortly after the release of the men, who ultimately received 500*l.* each by way of compensation from the Treasury.

(*r*) Introd. pt. 2, § 69.

(*s*) *Supra*, § 597.

(*t*) Bk. 1, pt. 2, § 119.

the trial was without a jury, — namely, on a trial by witnesses, — the rule of the civil and canon law was thought binding, and two witnesses were exacted (*u*).

§ 600. Some modern jurists, not satisfied with condemning the civil law for requiring at least two witnesses in all cases, attack ours for not going far enough in the opposite direction, and would abolish the exceptions to the rule which declares the testimony of one to be sufficient. At the head of these stands Bentham (*x*), whose arguments have been considered in the Introduction (*y*); but who, after all, admits, what indeed it would be difficult to deny, that requiring the second witness is, to a certain extent at least, a protection against perjury (*z*).

§ 601. On the whole, we trust our readers will agree with us in thinking that any attempt to lay down a *universal* rule on this subject which shall be applicable to all countries, ages, and causes, is ridiculous; and that, although so far as this country is concerned, the general rule of the common law — that judicial decisions should proceed on the intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence — is a just one (*a*), there are cases where, from motives of public policy, it has been wisely ordained otherwise.

§ 602. Of the exceptions to the general rule respecting the sufficiency of one witness, some exist by the common law, but by far the greater number have been introduced by statute.

§ 603. 1.° Exceptions at common law. 1. The most remarkable and important of these is in the case of prosecutions for perjury (*b*).[1] We speak of this as an exception established by common law, because it is generally so considered, and certainly does not appear to have been introduced by statute. But whether our law has always required the testimony of two witnesses to be given *to the judge and jury* on a charge of perjury, may be questioned, as most of our early text-writers are silent on the subject (*c*). Fortescue, indeed (*d*), says,

(*u*) *Infrà.*

(*x*) 4 Benth. Jud. Ev. 503; 5 *Id.* 463 *et seq.*

(*y*) Pt. 2, § 53.

(*z*) 5 Benth. Jud. Ev. 468.

(*a*) An eminent French jurist of our day calls it "vérité de sens commun, qu'il faut péser les témoignages et non les compter." Bonnier, Traité des Preuves, § 198.

(*b*) 4 Blackst. Comm. 358; 2 Ev. Poth. 280; 2 Stark. Ev. 859, 3rd Ed.; *R.* v. *Muscot*, 10 Mod. 192; *Fanshaw's case*, Skinn. 327; *R.* v. *Broughton*, 2 Str. 1229, 1230.

(*c*) See 2 Hawk. P. C. c. 46, s. 2, and c. 25, s. 131 *et seq.* &c.

(*d*) Fortesc. de Laud. c. 32.

[1] See § 596, n. 1 (*b*), *supra.*

"Qui testes de perjurio convincere satagit, multò illis plures producere necesse habet," — a passage transcribed without comment by Sir Edward Coke (*e*), but the context of which renders it doubtful whether, when the Chancellor wrote these words, he meant to express a legal rule. A stronger argument may be derived from the well-known practice in attaint, that a jury of twelve men could only be attainted of false verdict by a jury of twenty-four. But, on the other hand, we must recollect that in early times the jury themselves were looked on as witnesses (*f*), who might convict of perjury, or, indeed, of any offence, on their own knowledge without other testimony. *R.* v. *Muscot* is the leading case on this subject (*g*). That was an indictment for perjury; and Parker, C. J., in summing up, is reported to have said (*h*): "There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and, therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath." Now the book called "The Modern Reports" is not of very high authority; but even supposing the utmost accuracy in the above report, there is nothing in Chief Justice Parker's charge inconsistent with the supposition that his observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with which he sets out, between the proof in perjury and that in civil cases.

§ 604. The rule requiring two witnesses in indictments for perjury applies only to the proof of the falsity of the matter sworn to by the defendant: all preliminary or collateral matters — such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, &c. — may be proved in the usual way (*i*).

§ 605. The reason usually assigned in our books for requiring two witnesses in perjury — viz., that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single

(*e*) 3 Inst. 163.
(*f*) *Suprà*, bk. 1, pt. 2, § 119.
(*g*) 10 Mod. 192, Mich. 12 Ann.
(*h*) *Id.* 194.
(*i*) Tayl. Ev. § 880; 2 Gr. Russ. 654.

witness is produced to falsify it, there is nothing but oath against oath (*k*) — is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition may be much stronger with reference to the event on the one side than the motives for a false accusation of perjury on the other (*l*). In many cases, even of the most serious kind, tribunals are compelled to decide on the relative credit of witnesses, who swear in direct contradiction to each other. Where, for instance, a murder or larceny is proved by one or more witnesses, and an alibi, or other defence wholly irreconcilable with their evidence, and inconsistent with any hypothesis of mistake, is proved by a like number produced by the accused; the verdict of the jury may virtually, though not formally, determine that one set of witnesses or the other has committed perjury.

§ 606. The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them, — we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission, — such as publicity, cross-examination, the aid of a jury, &c.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved (*m*). But in order

(*k*) 4 Blackst. Comm. 358; Peake's Ev. 9, 5th Ed.; 3 Stark. Ev. 859, 3rd Ed.; 3 Gr. Russ. 77–78, 4th Ed.; *R.* v. *Harris*, 5 B. & A. 939, n.

(*l*) 2 Ev. Poth. 280.

(*m*) We have not overlooked the vexata quæstio, whether the taking away life by false testimony is punishable capitally by English law; on which subject see Fost. Cr. Law, 131, 132; 19 How. St. Tr. 810, n.; 4

to carry out the great objects above mentioned, our law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture (*n*); it allows no action to be brought against a witness, for words written or spoken in the course of his evidence (*o*); and it throws every fence round a person accused of perjury. Besides, great precision is required in the indictment; the strictest proof is exacted of what the accused swore; and, lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result accordingly is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indictment for perjury is treated by honest and upright witnesses as a brutum fulmen.

§ 607. This view of the policy of our law is supported by the history of legislation on the subject of perjury. The law of the Twelve Tables at Rome, recognising the impossibility of dealing with this offence according to its guilt in foro cœli, laid down, "Perjurii pœna divina, exitium; humana, dedecus" (*p*); and according to the Digest, "Qui falso vel varie testimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur" (*q*). The legislators of the middle ages, at least in this country, took, as might be expected, the higher and more violent view of the matter, — the punishment of perjury being anciently death, afterwards banishment, or cutting out the tongue, then forfeiture of goods (*r*). But in modern times the punishment for perjury has been fixed at a maximum of seven years' penal servitude or imprisonment (*r'*).

Blackst. Comm. 138 and 139; and 196, with note (4) of Professor Christian. Supposing the affirmative, it could only be by an indictment, not for perjury, but for murder; for it is clear that no capital indictment could be framed for bearing false witness with intent to murder, where no conviction of the innocent party ensued. And as in all cases of homicide, the death of the deceased must be clearly and unequivocally traced to the act of the accused, no such indictment for murder could be sustained, if any other evidence, certainly if any other material evidence besides that of the accused, were given on the former trial; for it would be impossible to measure the effect of his testimony on the mind of the tribunal. Indeed, in most, if not in all such unhappy cases, more or less blame rests with the tribunal in rashly giving credit to the false evidence; and of this opinion are said to have been the old Gothic lawgivers, who under such circumstances punished both the witness and the judge, and, to make all sure, the prosecutor. See 4 Blackst. Comm. 196.

(*n*) Bk. 2, pt. 1, ch. 1.

(*o*) *Dawkins* v. *Lord Rokeby*, L. Rep., 8 Q. B. 255; *Henderson* v. *Broomhead*, 4 H. & N. 569; *Revis* v. *Smith*, 18 C. B. 126; *Collins* v. *Cave*, 4 H. & N. 235; affirm. on error, 6 *Id.* 131.

(*p*) 4 Blackst. Comm. 139.

(*q*) Dig. lib. 22, tit. 5, l. 16.

(*r*) 3 Inst. 163; 4 Blackst. Comm. 138.

(*r'*) See *ante*, sect. 55.

§ 608. It is not easy to define the precise amount of evidence required, from each of the witnesses or proofs in such cases. Indeed, as was well observed by a very learned judge (*a*), any attempt to do so would be illusory. Mr. Starkie, in his Treatise on Evidence (*b*), informs us that *he heard* it once held by Lord Tenterden that the contradiction of the evidence given by the accused must be given by *two direct witnesses;* and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient; and allusion to a ruling of that sort was made by Coleridge, J., in a case before him (*c*). But this decision, if it ever took place, is most certainly not law. It would be a startling thing to proclaim that if a man can get rid of all direct, he may defy all circumstantial, evidence, and commit perjury with impunity; and we accordingly find a contrary doctrine laid down in a variety of cases (*d*). Again, some modern authorities express themselves as though it would be sufficient if one witness were to negative directly the matter sworn to by the defendant; and some material circumstances were proved by another witness, in *confirmation* or *corroboration* of his testimony (*e*). So that, according to this view, it would only be necessary to corroborate the testimony of the direct witness in the same manner as judges are in the habit of requiring the testimony of an accomplice to be corroborated; or as the testimony of a woman must be corroborated who seeks to fix a man with the maintenance of a bastard child (*f*), or for damages for a breach of promise of marriage (*g*).

§ 609. It becomes, therefore, a question whether the old rule and reason of the matter are satisfied, unless the evidence of each witness has an existence and probative force of its own, independent of that of the other; so that, supposing the charge were one in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury, or would at least raise a strong suspicion of the guilt of the defendant. And by analogy to this, where the evidence is — as it undoubtedly may be by law — wholly circumstantial, whether enough must not be proved by each witness to form a case fit to be left to the jury, if the artificial rule requiring two witnesses did not intervene; or

(*a*) Per Erle, C. J., *R.* v. *Shaw*, 10 Cox, C. C. 66, 72.

(*b*) 3 Stark. Ev. 860, n. (*q*) 3rd Ed.

(*c*) *Champney's case*, 2 Lew. C. C. 258.

(*d*) See 3 Russell on Crimes, 72 *et seq.*, 5th Ed., and the cases cited *infrà*. The same was also laid down by Cresswell, J., in *R.* v. *Young*, Kent Sum. Ass. 1853, MS.

(*e*) 1 Greenl. Ev. § 257, 7th Ed.; Tayl. Ev. § 876, 4th Ed.; *R.* v. *Gardiner*, 8 C. & P. 739; *R.* v. *Yates*, C. & Marsh. 159.

(*f*) 35 & 36 Vict. c. 65, s. 4, re-enacting, in substance, 7 & 8 Vict. c. 101, s. 3.

(*g*) 32 & 33 Vict. c. 68, s. 2.

whether it would be sufficient, if the evidence of one witness were such as to raise a *violent* presumption of guilt, and that of another to raise a reasonable suspicion of it, — "Præsumptio violenta valet in lege" (*h*).

§ 610. To test this view of the law by the decisions and language of judges. In *R.* v. *Parker* (*i*), Tindal, C. J., says, "With regard to the crime of perjury the law says that where a person is charged with that offence, it is not enough to disprove what he has sworn by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness, it is not enough." In *Champney's case* (*k*), Coleridge, J., said that "one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C. J., was of opinion that two witnesses were necessary to a conviction;" and the reporter adds, that the doctrine of *Champney's case* was ruled by the same judge in a case of *R.* v. *Wigley*. In *R.* v. *Yates* (*l*), Coleridge, J., also said: "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction." In *R.* v. *Roberts* (*m*), Patteson, J., said: "If the false swearing be, that two persons were together at a certain time; and the assignment of perjury be, that they were not together at that time, — evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof of the assignment of perjury." And, lastly, in *R.* v. *Mayhew* (*n*), — where the defendant, an attorney, was indicted for perjury in an affidavit made by him in opposition to a motion to refer his bill of costs for taxation, — one witness was called to prove the perjury; and in lieu of a second, it was proposed to put in the defendant's bill of costs which he had delivered. On this being objected to, Lord Denman, C. J., said: "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence; or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." Sir W. D. Evans tells us that he recollects having seen this principle acted on in practice in his time (*o*); though there is an old case in Siderfin to the contrary (*p*). The question as

(*h*) Jenk. Cent. 2, Cas. 3. See Co. Litt. 6 b; and *supra*, ch. 2, § 317.
(*i*) C. & Marsh. 646.
(*k*) 2 Lew. C. C. 258.
(*l*) C. & Marsh. 139.
(*m*) 2 Car. & K. 614.
(*n*) 6 C. & P. 315.
(*o*) 2 Ev. Poth. 280.
(*p*) *R.* v. *Carr*, 1 Sid. 419; Resol. 3.

to the quantity of evidence required on a prosecution for perjury was also fully discussed before the Court of Criminal Appeal in a case of *R.* v. *Boulter* (*q*), which case, however, was disposed of on the special circumstances, without the court laying down any general principle; and a good instance of the application of the general rule to the advantage of a defendant may be found in the direction of Stephen, J., to acquit the defendant in *R.* v. *Endacott* (*q'*). There the defendant was a metropolitan police constable, and the charge of perjury was that he had sworn that he had seen a girl whom he had given into a custody as a prostitute, three times in Regent Street during six weeks. Stephen, J., stated the rule of law to be that "if upon a trial for perjury the only evidence against the defendant is the statement of one witness contradicting the oath on which the perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted," pointed out that the contradiction of the girl herself was substantially the sole evidence against the constable, and strongly commented on the possibility of a mistake on the part of the constable. Probably the soundest view of this subject is that stated by Erle, C. J., in *R.* v. *Shaw* (*r*); viz., that the degree of corroborative evidence requisite in such cases must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

Where the alleged perjury consists in the defendant having sworn contrary to what he had previously sworn on the same subject, the case is not within the rule we have been considering; and the defendant may be convicted, simply upon proof of the contradictory evidence given by him on the two occasions (*s*).

§ 611. 2. The next exception is in the proof of wills attested by more than one witness, in the manner formerly required by the Statute of Frauds, 29 Car. 2, c. 3, s. 5, and now by the 7 Will. 4 & 1 Vict. c. 26, and 15 & 16 Vict. c. 24 (*t*).[1] The practice under both these statutes is thus stated in a text-book: "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary to call one of them, *excepting* in the case of *wills* relating to real estate; with respect to which it has for many years been the practice of courts of equity, and is now the practice of all the courts, to require that all the witnesses who are in England, and capable of being called, should be examined. It used to be said that all the

(*q*) 2 Den. C. C. 396.
(*q'*) Times, November 2nd, 1887.
(*r*) 10 Cox, C. C. 66, 72.
(*s*) *R.* v. *Knill*, 5 B. & Al. 929, n. (*a*).
(*t*) See bk. 2, pt. 3, ch. 1, § 222.

[1] See § 596, n. 1 (*h*), *supra*.

subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor" (*u*).

§ 612. 3. Another exception to this rule was in the "trial by witnesses," or, as our old lawyers expressed it, "trial by proofs,"— expressions used in our books to designate a few cases which were tried by the judges instead of a jury. It is not easy to fix precisely what these cases were. About one, indeed, there can be no question; viz., where on a writ of dower, the tenant pleaded that the husband of the demandant was still living (*x*); and Finch (*y*), relying on the obiter dictum of the court in 8 Hen. VI. 23, pl. 7, says that this was the *only* case in which trial by witnesses was allowed. But other authorities mention several more, — *e. g.*, the summons of a tenant in a real action (*z*); the summons of a juror in an assize (*a*), and the challenge of a juror (*b*); and two viewers are said to have been required in an action of waste (*c*). Mr. Justice Blackstone endeavours to reconcile this discrepancy by supposing that the plea of the life of the husband in a writ of dower was the only case in which the direct issue in the cause was tried by witnesses, all the other instances being of collateral matters (*d*). But it is not quite clear that, in ancient times, issue taken on the death of the husband in a cui in vitâ (*e*), and in some other cases (*f*), was not tried by witnesses; and with respect to the action of dower, although modern authorities speak of the above plea as a plea in bar (*g*), some of the old authorities treat it as a dilatory plea (*h*). Real and mixed actions are now abolished by 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26; but it may be a question whether two witnesses are not still required when, in an action for dower brought in the form given by the latter act, the death of the husband is disputed.

§ 613. The evidence on this kind of trial need not be direct; it is sufficient if the witnesses speak to circumstances, giving rise to a reasonable intendment or presumption of the truth of the fact which they are called to prove (*i*).

(*u*) Tayl. Ev. § 1854, 7th Ed., citing the 25th section, subs. 11 of the Judicature Act, 1873, as making the Chancery practice generally applicable.

(*x*) 3 Blackst. Comm. 336; Finch, Law, 423; 8 Hen. VI. 23, pl. 7; 56 Hen. III., cited 2 Rol. Abr. 578, pl. 14.

(*y*) Finch, *in loc. cit.*

(*z*) Co. Litt. 6 b; Gilb. Ev. 151, 4th Ed.

(*a*) Co. Litt. 158 b.

(*b*) Co. Litt. 6 b. This probably means, an objection to the sufficiency of the summons of a juror in a real action; see 2 Hawk. P. C. c. 25, s. 131. Certain it is that no such rule is observed in modern practice when a juror is challenged.

(*c*) Clayt. 89, pl. 150.

(*d*) 3 Blackst. Comm. 336.

(*e*) 2 Edw. II. 24, tit. Cui in Vitâ.

(*f*) See 36 Ass. pl. 6; 39 *Id.* pl. 9; 30 *Id.* pl. 26; 43 *Id.* pl. 26.

(*g*) Com. Dig. Pleader, 2 Y. 9; 2 Wms. Saund. 44 d, 6th Ed.

(*h*) Bract. lib. 4, c. 7, fol. 301, 302; Dyer, 185 a, pl. 65.

(*i*) *Thorne* v. *Rolff*, Dyer, 185 a, pl. 65; 1 Anders. 20, pl. 42.

§ 614. 4. There seems to be some difference among the authorities as to whether two witnesses were required on a claim of villenage or niefty (*k*). If such were the rule, it was a good one in favorem libertatis; but it is needless to pursue the inquiry at the present day.

§ 615. We now proceed to the statutory exceptions. Of these the most important and remarkable is found in the practice on trials for high treason and misprision of treason. The better opinion and weight of authority are strongly in favour of the position that at the common law a single witness was sufficient in high treason, and à fortiori in petty treason or misprision of treason (*l*). In the 3 Inst. 26, however, Sir Edward Coke says: "It seemeth that, by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason. . . . And that two witnesses be required, appeareth by our books" (here he cites several authorities, all of which relate to the two witnesses required on a trial by witnesses (*m*), and have no reference to treason or criminal proceedings), "and I remember no authority in our books to the contrary; and the common law herein is grounded upon the law of God, expressed both in the Old and New Testament; Deut. xvii. 6, xix. 15; Matt. xviii. 16; John, xviii. 23 (perhaps meant for John, viii. 17); 2 Cor. xiii. 1; Heb. x. 28: 'In ore duorum aut trium testium peribit qui interficietur; Nemo occidatur uno contra se dicente testimonium.'" Now, supposing these and similar passages of Scripture to be applicable to municipal law at all (*n*), a decisive answer to Sir Edward Coke is given by Serjeant Hawkins (*o*), — viz., that his argument proves too much; for that "whatsoever may be said either from reason or Scripture for the necessity of two witnesses in treason holds as strongly in other capital causes, and yet it is not pretended that there is, or ever was, any such necessity in relation to any other crime but treason." Besides, the authority of some parts of the 3rd Institute has been doubted (*p*). Perhaps the hypothesis offered in a former part of this chapter, respecting the origin of the rule requiring two witnesses in perjury, may assist us here also; viz., that our old lawyers considered two witnesses necessary on all criminal charges, including treason, but deemed this requisite complied with when the trial was by jury, who, in those days, were looked on as witnesses (*q*).

(*k*) See Britton, c. 31; 2 Rol Abr. 675, Evidence, pl. 3; F. N. B. 78, H.; and Fitz. Abr. Villenage, pl. 39.

(*l*) 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2; Foster, Cr. Law, 233; 1 Greenl. Ev. § 255, 7th Ed; Taylor, Ev. § 869, 4th Ed.; *The Case of Clipping*, T. Jones, 263; Bro. Abr. Corone, pl. 219; Dyer, 132, pl. 75; Kel. 18 and 49; 1 Hale, P. C. 297–301, 324; 2 *Id.* 286, 287.

(*m*) See *supra*, § 612.

(*n*) See, on this subject, *supra*, § 597.

(*o*) 2 Hawk. P. C. c. 25, s. 131.

(*p*) Kely. 49.

(*q*) *Supra*, § 603. The rule that two witnesses are required to support a charge

§§ 616–618 (*q'*). At common law, then, a charge of treason might be maintained on the testimony of a single witness, but two witnesses were made requisite by 1 Ed. c. 12, and 5 & 6 Ed. c. 11. But a subsequent statute, 1 & 2 P. & M. c. 10, s. 7, having directed that all trials for treason should be had only according to the due order and course of the common law, and not otherwise, the judges of those days doubted, or affected to doubt, whether the statutes of Edw. VI. were not repealed. The question was raised in several cases, and the doubt finally overruled in the time of Charles II. (*r*).

The modern law on this subject is contained in 7 & 8 Will. 3. c. 3, by s. 2, of which no person may be tried, for treason or for misprision of treason, "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason," unless the party tried confess the same, or stand mute, or refuse to plead.

The reason for requiring two witnesses in high treason and misprision of treason— unquestionably that which influenced the framers of the modern statutes on the subject, whatever may have been the motives of those of the earlier ones — is the peculiar nature of these offences, and the facility with which prosecutions for them may be converted into engines of abuse and oppression (*x*). For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment, yet it is one so difficult to define — the line between treasonable conduct and justifiable resistance to the encroachments of power, or even the abuse of constitutional liberty, is often so indistinct; the position of the accused is so perilous, struggling against the whole power and formidable prerogatives of the crown — that it is the imperative duty of every free state to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents (*y*). With this view the 7 & 8 Will. 3, c. 3, besides requiring two witnesses as already stated, enacts, inter alia, that no person shall be tried for any of the treasons therein mentioned except attempts to assassinate the king, unless the indictment be found within three years after the offence committed (*z*); that the accused shall have a copy of the indictment five days before the

of treason is incorporated in the Constitution of the United States of America, where, however, it seems that one witness may be sufficient to prove one act, and one another.

(*q'*) These sections have been somewhat shortened in the present edition.

(*r*) Fost. C. L. 237.

(*x*) 4 Blackst. Comm. 358; Gilb. Ev. 152, 4th Ed.

(*y*) Gilb. Ev. 152, 4th Ed.

(*z*) 7 & 8 Will. 3, c. 3, s. 6.

trial (*a*), and a copy of the jury panel two days before the trial (*b*). And by 7 Anne, c. 21, s. 11 (in part repealed and re-enacted by 6 Geo. 4, c. 50), a copy of the indictment, a list of the witnesses to be produced, and of the jurors impanelled, are to be delivered to him a certain time before the trial. All these protections have been taken away, by subsequent statutes, from certain cases of treason and misprision of treason, which, though within the letter, are certainly not within the spirit of the former enactments; viz., where the overt acts of treason charged in the indictment are the assassination of the sovereign, or any direct attempt against his life or person (*c*).

§ 619. The principle of 7 & 8 Will. 3, c. 3, requiring two witnesses in treason, has, however, been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible (*d*); but he afterwards makes some observations which it would be difficult to reconcile with this language (*e*). Bentham, as might be expected, strongly condemns it (*f*); but his chief arguments are directed against the portions now repealed by 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51 (*g*). He observes, however, that after the passing of this statute, "a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe. . . . As to the other provisions, then, all of them have their merit; some of them were no more than the removal of barefaced injustice; but as to this, it was specially levelled, not against false accusations, but against true ones" (*h*).

All this reasoning, however, is more specious than sound. It seems based, in some degree at least, on the false principle that has been examined in the Introduction to this work (*k*), and which is to be found more or less in every part of Bentham's Treatise on Judicial Evidence; viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offence of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. Besides, the above authors appear to have assumed that in

(*a*) 7 & 8 Will. 3, c. 3, s. 1.

(*b*) *Id.* sect. 7.

(*c*) 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51.

(*d*) Fost. C. L. 221; 5 Benth. Jud. Ev. 489.

(*e*) Fost *in loc. cit.* The passages referred to will be found in Burnet's History of his own Times, vol. 2, p. 141, Ed. 1734.

(*f*) 5 Benth. Jud. Ev. 485–495.

(*g*) See *supra*, § 618, and, *infra*, bk. 4, pt. 1, ch. 2.

(*h*) 5 Benth. Jud. Ev. 490.

(*k*) Introd. pt. 2, § 49.

the case put of ministers corresponding with attainted persons by means of a single emissary, and such like, the incapacity to prosecute for *treason* involves impunity to the criminal. They forget that there has always been such an offence as *seditious conduct*, which, being only a misdemeanour, may be proved by one witness, and which does not merge in the treason (*l*). And of late years the legislature has created an intermediate offence between treason and sedition, by making various acts, committed against the crown and government of the country, felony, and severely punishable (*m*). By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason. But, on the other hand, those who are innocent of that terrible crime lie under no dread of being falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable proof that the blow descends on the disaffected portion of society with a moral weight, increased a hundred-fold by the moderation of the executive in less aggravated cases.

§ 620. The rule requiring two witnesses in treason only applies to the proof of the overt acts of treason charged in the indictment: any collateral matters may be proved as at common law (*n*); such as that the accused is a subject of the British crown (*o*), and the like. Nor perhaps does it hold on the trial of collateral issues; as, for instance, where a prisoner convicted of treason makes his escape, and on being retaken and brought up to receive judgment, denies his identity with the party mentioned in the record of conviction (*p*).

§ 621. There are other statutory exceptions to the rule in question. By the Bastardy Amendment Act, 1872, 35 & 36 Vict. c. 65, s. 4, re-enacting in substance the repealed 7 & 8 Vict. c. 101, s. 3, already referred to (*q*), an order of affiliation may be made against the putative father of a bastard child only if the evidence of its mother be corroborated in some material particular, by other testimony, to the satisfaction of the court. By the 32 & 33 Vict. c. 68, s. 2, which first made the parties to actions for breach of promise of marriage competent to give evidence therein, no plaintiff in such action may recover a verdict unless his or her testimony shall be corroborated by some other material evidence (*q'*). And by sections 1 & 2 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, which

(*l*) 4 Blackst. Comm. 119; *R.* v. *Reading*, 7 How. St. Tr. 265–267.

(*m*) 11 & 12 Vict. c. 12.

(*n*) Tayl. Ev. § 872, 4th Ed.; Fost. C. L. 240–242; 1 East, P. C. 130.

(*o*) Fost. C. L. 240; *R.* v. *Vaughan*, 13 How. St. Tr. 535, per Holt, C. J.

(*p*) In such cases the prisoner has no peremptory challenge. *Ratcliffe's case*, Fost. C. L. 42.

(*q*) *Suprà*, § 608, n. (*f*).

(*q'*) See *Wiedeman* v. *Walpole* (1891), 2 Q. B. 534, and s. 401, *ante*.

punish the procuration of women, and the compassing the defilement of women by means of threats, fraud, or drugging, it is enacted that no person shall be convicted of these offences upon the evidence of one witness only, not being similarly corroborated. Another exception is created by s. 4 of the same act, which, while admitting the unsworn evidence of any young child not understanding the nature of an oath, upon a prosecution, for the defilement of a girl under 13 years of age enacts that no person shall be liable to be convicted of that offence unless the testimony of the young child, which is given on behalf of the prosecution, "be corroborated by some other material evidence in support thereof implicating the accused." It will be observed that all these four enactments deal with cases in which the principal witness would probably be a woman. Speaking generally, it may be said that where one witness only appears in support of an action or prosecution, where it is only a case of oath against oath, as it is said, or where the person against whom the testimony is given cannot controvert it by testimony of his own, the evidence of such a witness ought to be very jealously watched and carefully sifted. Especially is this the case with regard to accomplices, and with regard to claims against the estates of deceased persons. In both these instances, however, it is undoubted that the uncorroborated evidence of a single witness is admissible (*r*).

There is in England no rule of law precluding a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; but the court will in general receive such corroboration (*a*), and in Ireland it has been said that there is a positive rule of law admitting of no exception that a claim upon the assets of a deceased person cannot be allowed on the uncorroborated evidence of the claimant (*b*). In Scotland, the general rule is that the testimony of one witness is not full proof of any ground of action or defence whatever (*c*). The remaining instance, in 11 & 12 Vict. c. 12, s. 4, which enacts that no person shall be convicted of certain offences of a treasonable character made felony by that statute, "in so far as the same are expressed, uttered, or declared by open or advised speaking, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses," merely follows the general law of evidence of treason, which is dealt with above.

§ 622. Although, as has been just shown, the law of this country requires a certain numerical amount of proofs in particular cases, it

(*r*) As to accomplices, see s. 173, *ante*.

(*a*) Hodgson, *in re*, 31 Ch. D. 177; 55 L. J., Ch. 241, C. A.

(*b*) Harnett, *in re*, 17 L. R. Ir. 543.

(*c*) Dickson on Evidence, vol. ii., p. 1018.

has avoided the great mistake into which the civilians fell, of attaching to those proofs an artificial weight, and leaves their value to the discrimination of a jury. From motives of legal policy, no decision may in such cases be based on the testimony of a single witness, however credible; but when more are adduced, be the number what it may, their testimony must, if untrustworthy in the eyes of the jury, go for nothing.

AMERICAN NOTES.

(§ 596) Quantum of Evidence Required. — Corroboration. — In certain cases policy of law requires that conviction shall not follow the uncorroborated testimony of a single witness.

(*a*) *Treason.* — Article III., sect. 3, of the Constitution of the United States provides, "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." 1 Greenl. Ev. §§ 235, 255; 3 Greenl. Ev. §§ 246, 248; 2 Whar. Crim. Law, § 1808 *et seq.*; 2 Story, Const. § 1796 *et seq.*; Fries's case, Wharton's State Trials, 482, 585 *et seq.* See also U. S. *v.* Hanway, 2 Wall. Jr. 139. But see 1 Burr's Trial (Hopkins & Earle's Ed.), 196.

(*b*) *Perjury.* — If upon an indictment for perjury, the sole evidence against the accused, showing the wilful falsity of his testimony, is the oath of a single witness contradicting the oath alleged to be perjured,— *i. e.*, if no facts be proved which corroborate the witness, — it is the duty of the jury to acquit. 1 Greenl. Ev. § 257; U. S. *v.* Wood, 14 Pet. 430, 440, 441; Woodbeck *v.* Keller, 6 Cowen, 118; State *v.* Molier, 1 Dev. 263; State *v.* Hayward, 1 Nott & McC. 546; Laughran *v.* Kelly, 8 Cush. 199; State *v.* Heed, 57 Mo. 252; State *v.* Wood, 17 Ia. 18; Dodge *v.* State, 24 N. J. L. 455; Crusen *v.* State, 10 Oh. St. 258; Hendricks *v.* State, 26 Ind. 493; State *v.* Raymond, 20 Ia. 582. See also Rice *v.* Coolidge, 121 Mass. 393; Marvin *v.* State, 53 Ark. 395.

(*c*) *Corpus Delicti.* — In perjury, as in other crimes, it is not necessary that the *corpus delicti* should be proved by the testimony of a living witness. U. S. *v.* Wood, 14 Pet. 430, 441. Or by more than a single witness. Com. *v.* Pollard, 12 Metc. 225; State *v.* Wood, 17 Ia. 18. But see People *v.* Evans, 40 N. Y. 1. As to the general rule that circumstances or documentary evidence may prove the *corpus delicti* where more conclusive evidence is not available, see U. S. *v.* Williams, 1 Cliff. 5. In general, however, the *corpus delicti* must be strongly established. For this reason, an extra-judicial confession has been held insufficient. Bergen *v.* People, 17 Ill. 426; State *v.* German, 54 Mo. 526; Ruloff *v.* People, 18 N. Y. 179; State *v.* Keeler, 28 Ia. 551; Smith *v.* Com., 21 Gratt. 809.

(*d*) *Answers in Chancery.* — By analogy to the rule in cases of perjury, if the defendant in express terms negatives in his answer an allegation in the plaintiff's bill, such allegation must be proved by two witnesses, or by a single witness enforced by corroborating circumstances. Lawton *v.* Kittredge, 30 N. H. 500; Ing *v.* Brown, 3 Md. Ch. 521; White *v.* Crew, 16 Ga. 416; Calkins *v.* Evans, 5 Ind. 441; Abbott *v.* Case, 26 N. J. Eq. 187. See also Sower *v.* Weaver, 78 Pa. St. 443.

(*e*) *Accomplices.* — The fact that the evidence against the accused is the testimony of an accomplice is at most matter for comment. Such evidence will justify conviction. State *v.* Russell, 33 La. An. 135; People *v.* Costello, 1 Denio (N. Y.), 83; State *v.* Litchfield, 58 Me. 267; Watson *v.* Com., 95 Pa. St. 418, 424; Com. *v.* Bosworth, 22 Pick. 397; State *v.* Kibling, 63 Vt. 636; State *v.* Miller, 97 N. C. 484; Parsons *v.* State, 43 Ga. 197; State *v.* Watson, 31 Mo. 361; State *v.* Stebbins, 29 Conn. 463; R. *v.* Beckwith, 8 U. C. C. P. 274; R. *v.* Andrews, 12 Ont. Rep. 184. But see People *v.* Evans, 40 N. Y. 1; U. S. *v.* Harries, 2 Bond, 311; State *v.* Allen, 57 Ia. 431; Cheatham *v.* State, 67 Miss. 335. In some States corroboration is necessary. Dunn *v.* State, 15 Tex. App. 560; Melton *v.* State, 43

Ark. 367; Craft *v.* Com., 81 Ky. 250. But slight corroboration will suffice. Evans *v.* State, 78 Ga. 351; Com. *v.* Chase, 147 Mass. 597; State *v.* Streeter, 20 Nev. 403; People *v.* O'Neil, 109 N. Y. 251. A confession has been held to be sufficient. Patterson *v.* Com., 86 Ky 313. One accomplice cannot, it is said, corroborate another. Phillips *v.* State, 17 Tex. App. 169. See also R. *v.* Perry, 1 L. C. L. J. 60.

(*f*) *Bastardy, &c.* — In bastardy suits the evidence of the mother will not in all cases be taken as conclusive, in the absence of corroboration. The matter is variously regulated by statute. See Stiles *v.* Eastman, 21 Pick. 132. So the uncorroborated evidence of the libellant, or the uncorroborated admission of the libellee, will not, in general, warrant a divorce. Tate *v.* Tate, 26 N. J. Eq. 55; Robbins *v.* Robbins, 100 Mass. 150. But see Flattery *v.* Flattery, 88 Pa. St. 27, *contra*. So in an action for seduction. State *v.* Wells, 48 Ia. 671.

(*g*) *Usage of Trade.* — It has been said that a prevailing usage of trade cannot be established by a single witness. 1 Greenl. Ev. § 260 (*a*); Wood *v.* Hickok, 2 Wend. 501; Boardman *v.* Spooner, 13 All. 353, 359. This may well be doubted. Robinson *v.* U. S., 13 Wall. 363, 366.

(*h*) *Statutes.* — As to how far statutory enactments — *e. g.*, the Statute of Frauds — require a certain kind of proof or number of witnesses to give effect to an instrument or prove its execution, conf. 1 Greenl. Ev. §§ 261–274. See also Melcher *v.* Flanders, 40 N. H. 139; Hunter *v.* Gardenhire, 13 Lea, 658; Burke *v.* Miller, 7 Cush. 547; Cornwell *v.* Wooley, 43 How. Prac. 475.

(*i*) *Accumulation of Evidence.* — The *quantum* of evidence *permitted* upon a given point, as distinguished from the *quantum* of evidence required, rests in the discretion of the court, which will not permit a trial mischievously to be protracted by evidence or examinations merely cumulative in their nature. Bunnell *v.* Butler, 23 Conn. 65; Bissell *v.* Cornell, 24 Wend. 354; Gray *v.* St. John, 35 Ill. 222; Wright *v.* Foster, 109 Mass. 57; Adriance *v.* Arnot, 31 Mo. 471. As a general rule, however, one witness is sufficient if believed. Totel *v.* Bonnefoy, 23 Ill. App. 55; Fengar *v.* Brown, 57 Conn. 60; Benter *v.* Patch, 7 Mackie, 590.

CHAPTER XI.

ADMISSIBILITY OF THE EVIDENCE OF ACCUSED PERSONS.

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§ 622 A. Two principles of English law appear to be at the foundation of the inadmissibility of the evidence of accused persons, — the principle that no person is bound to criminate himself (*o*), and the principle that the evidence of an interested person is worse than useless (*p*). When Lord Denman's Act, 6 & 7 Vict. c. 85, abolished generally "incompetency from interest," the legislature was careful to retain an exception for the party individually named in the record. Again, in 1851 and 1853, when parties generally, and their husbands and wives, became competent *and compellable* witnesses by virtue of 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, the legislature took care to provide in both those acts that nothing in them should apply to criminal proceedings. All this time, however, prosecutors in criminal proceedings, who, though the crown is always the nominal party prosecuting, are themselves, by payment of the expenses and otherwise, frequently as much "interested" as the party prosecuted, were competent to give evidence; and the inconvenience as well as possible injustice of shutting out the testimony of the party prosecuted has given rise to much public discussion during the last twenty years.

The result has been the incorporation in a large number of modern statutes of a clause enabling the party charged with a crime to give evidence on his own behalf. Amongst these enactments, which are nineteen in all (*q*), may be specially mentioned the Licensing Act

(*o*) See § 555, *post*.

(*p*) See § 137, *ante*.

(*q*) They are as follows: —

35 & 36 Vict. c. 77 (Metalliferous Mines Act, 1872), s. 34, subs. 4.

35 & 36 Vict. c. 94 (Licensing Act, 1872), s. 51, subs. 4.

38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), s. 21.

38 & 39 Vict. c. 86 (Conspiracy and Protection of Property Act, 1875), s. 11.

39 & 40 Vict. c. 36 (Customs Consolidation Act, 1876), s. 259.

39 & 40 Vict. c. 80 (Merchant Shipping Act, 1876), s. 4.

40 & 41 Vict. c. 14 (The Evidence Act, 1877).

41 & 42 Vict. c. 12 (Threshing Machines Act, 1878), s. 3.

1872, 35 & 36 Vict. c. 94, s. 51, subs. 4, by which, "in all cases of summary proceedings under this Act, the defendant and his wife shall be competent to give evidence;" the Sale of Food and Drugs Act, 1875, 38 & 39 Vict. c. 63, s. 21, by which "the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly;" the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86, s. 11, by which "upon the hearing and determining of any indictment or information under sections four, five, and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses;" and — far more important than all — the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, s. 20, by which "every person charged with an offence under this Act, or under sect. 48 and sects. 52 to 55, both inclusive, of the Act of the session of the 24th and 25th years of the reign of Her present Majesty, c. 100, or any of such sections, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury." The charges on which an accused person may testify by virtue of the last-named enactment include abduction, rape, indecent assault, and various sexual offences, some of them first made criminal in 1885. The charges on which an accused person may testify by virtue of other enactments include charges of offences by persons licensed to sell intoxicating liquors, of breaches of special contracts of service, and of libel. The Criminal Law Amendment Act of 1885 affords the only instance of an accused person being enabled to give evidence on a charge of felony; and the Evidence Act, 1877, by which, on the trial of any indictment for non-repair of a highway or for a nuisance to a public highway, &c., and of any other indictment or proceeding instituted for the purpose of trying a civil right only, the defendant is competent to give evidence, affords the only instance of the accused being made compellable as well as competent.

So far back as 1878, an attempt was made by the government to deal

41 & 42 Vict. c. 74 (Contagious Diseases (Animals) Act, 1878), s. 66.
44 & 45 Vict. c. 58 (Army Act, 1881), s. 256.
45 & 46 Vict. c. 75 (Married Women's Property Act, 1882), s. 12.
46 Vict. c. 3 (Explosive Substances Act, 1883), s. 4.
46 & 47 Vict. c. 51 (Corrupt and Illegal Practices Prevention Act, 1883), s. 53.
47 & 48 Vict. c. 14 (Married Women's Property Act, 1884), s. 1.
48 & 49 Vict c. 69 (Criminal Law Amendment Act, 1885), s. 20.
50 & 51 Vict. c. 28 (Merchandise Marks Act, 1887), s. 10.
50 & 51 Vict. c. 58 (Coal Mines Regulation Act, 1887), s. 62, subs. (ii.).
51 & 52 Vict. c. 64 (Law of Libel Amendment Act, 1888), s. 9.
54 & 55 Vict. c. 76 (Public Health (London) Act, 1891), s. 118.

with the matter in accordance with the principle of these statutes. The Criminal Code Bill of that year contained a clause to the effect that every one accused of any indictable offence might make a statement on which he might be cross-examined, &c., but added the important proviso that "the defendant should not be sworn as a witness, nor be liable to any punishment for making false statements." The commissioners (Lord Blackburn, Barry, J., Lush, J., and Sir James Fitz-james Stephen, Q. C.), to whom this bill was referred, were divided in opinion as regarded "the policy of a change in the law so important," but were on the whole of opinion that "if the accused was to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination." They put forward a clause, which was subsequently embodied in other Criminal Code Bills, to the effect that an accused person and the husband or wife of an accused person should be competent but not compellable witnesses, and liable to a cross-examination, which the court might limit so far as it might extend to credit. A bill of 1880 was referred to a select committee of the House of Commons whose sittings were cut short by a dissolution with the result that no "Criminal Code Bill" has since then been re-introduced. For very many years, however, the late Bramwell in the House of Lords, and successive law officers in the House of Commons have brought forward "criminal evidence" bills to the same effect as the clause of the Criminal Code Bill by which it was proposed that accused persons should be competent witnesses, and Lord Bramwell's bill frequently passed the House of Lords. In 1888 the Government Bill was fully debated in the House of Commons, but though very strongly supported, failed to pass, on the ground of Irish members not being able to obtain the exclusion of Ireland from its operation (*r*).

In 1892 a similar Criminal Evidence Bill passed the House of Lords, and also passed a second reading in the House of Commons. It was then referred to the Standing Committee on Law, but too late to pass before the dissolution of Parliament in that year.

Very recently, however, the reform which has so long been unsuccessfully attempted here has been carried into effect in the colony of Victoria. An act which came into operation in that colony in the beginning of 1892 provides for the admissibility of the evidence of an accused person, or the husband and wife of an accused person, subject to four limitations, being (1) that the evidence is not to be

(*r*) See Hansard, vol. 324, pp. 68–147. The bill was supported by speeches from Sir C. Russell, Q. C., Sir Henry James, Q. C., Mr. Finlay, Q. C., Mr. Mildain, Mr. Donald Crawford, Mr. Bradlaugh, Mr. Madden, Sir Edward Clarke, Q. C. (S. G.), Mr. A. J. Balfour, and others.

compulsory; (2) that neither the husband nor wife of the accused is to be called as a witness without the consent of the accused; (3) that the accused before giving evidence is (if not professionally defended) to receive a written caution from the court as to his evidence being optional, and as to his liability to be cross-examined upon it, if given; and (4) that no comment is to be made on the fact that an accused person has not given evidence on his own behalf.

It seems that we cannot, in this country, stand still much longer. In point of form, at any rate, some fresh legislation by which the many varying enactments on the subject may be thrown into one is urgently required. As to the point of substance, whether accused persons ought to be allowed to give evidence or not, the authority in favour of an alteration of the law is now so great that to controvert it would be waste of time. As regards details, however, it is submitted that the proposal of the authors of the bill of 1878 that the evidence of the accused should be *unsworn*, was a sound one, and that the evidence of the first wife or husband should be made admissible in the case of a prosecution for bigamy. Looking to the ignorance and helplessness of many accused persons, and looking also to the analogies of Jerves's Act, 11 & 12 Vict. c. 42, s. 18, there seems to be some reason in the Victorian requirement that the accused person should be cautioned, but the caution should be administered verbally in open court. For the Victorian restriction, that no comment should be made on the accused person not availing himself of the power to give evidence, it is not so easy to find a reason.

BOOK IV.

OBSERVATIONS ON FORENSIC PRACTICE AND RULES FOR EXAMINATION OF WITNESSES.

PART I.

OBSERVATIONS ON FORENSIC PRACTICE.

§ 623. The rules of evidence, especially such as relate to evidence in causâ, are *rules of law*, which a court or judge has no more right to disregard or suspend than any other part of the common or statute law of the land (*a*). Those which regulate forensic practice are less inflexible; for although the mode of receiving and extracting evidence is governed by established rules, a discretionary power of relaxing these on proper occasions is vested in the tribunal; and indeed it is obvious that an unbending adherence under all circumstances to rules which are the mere *forma et figura judicii* would impede rather than advance the ends of justice.

The most convenient way of treating the present subject will be, first to describe the course of a trial, and then to examine the practice relative to its principal incidents as connected with the matter before us. But before doing either of these, it is advisable to direct attention to certain proceedings previous to trial.

(*a*) Bk. 1, pt. 1, §§ 80, 81, 86, and pt. 2, § 116.

CHAPTER I.

PROCEEDINGS PREVIOUS TO TRIAL.

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§ 624. 1. The common law laid down as a maxim, "Nemo tenetur armare adversarium suum contrà se" (*a*);[1] and, in furtherance of this principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause (*b*). The maxim, at least when pushed to this extent, was certainly not stamped with the wisdom which, for the most part, marks the common law (*c*); but the defect was in some degree remedied by the power which either party had of filing a bill in equity for the discovery of evidence, — a process, however, which was alike circuitous and expensive. In modern times the courts of common law took upon themselves to relax considerably the strictness of the ancient rule; and at length it became the established practice that when a document in which both litigant parties had a joint interest was in the custody or control of one of them, under such circumstances that he might fairly be deemed a trustee of it for both, the court would order an inspection and copy of it to be given to his adversary, if it were material to his suit or defence (*d*).

Even this, however, fell far short of the requirements of justice; and the legislature at length interfered, and by 14 & 15 Vict. c. 99,

(*a*) Co. Litt. 36 a; Wing. Max. 665.

(*b*) See per Holt, C. J., 3 Salk. 363.

(*c*) The maxim seems to have been derived from the Roman law. Cod. lib. 2, tit. 1, l. 4. So in the Scotch law, "Nemo tenetur edere instrumenta contra se." Halk. M. 100; Ersk. Inst. bk. 4, tit. 1, § 52.

(*d*) *Charnock* v. *Lumley*, 5 Scott, 438; *Steadman* v. *Arden*, 15 M. & W. 587; *Ley* v. *Barlow*, 1 Exch. 800; *The Metropolitan Saloon Omnibus Company* v. *Hawkins*, 4 H. & N. 146; *Price* v. *Harrison*, 8 C. B. N. S. 617.

[1] For the American law, see *infrà*, p. 580.

s. 6, empowered the superior courts of common law, and each of the judges thereof, on application made for such purpose, by either of the litigants in any action, or other legal proceeding pending in any of the said courts, to compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped; in all cases in which, previous to the passing of that Act, a discovery might have been obtained by filing a bill, or by any other proceeding in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge. And in the construction of this statute it was held, first, that it did not take away the common law; so that in every case in which a party could have obtained inspection before the statute, he might obtain it still, without reference to the statute (*e*); and, secondly, that the power conferred on the courts of common law by this statute could only be exercised in cases where the inspection sought for could be obtained by bill of discovery, or other proceeding in a court of equity; and did not enable them to compel a party to discover whether certain documents, or whether any and what documents relating to the cause, were in his possession or power (*f*).

§ 625. 2. This defect was remedied by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 50. And now, by the "Rules of the Supreme Court" (*g*), the court or a judge may, at any time during the pendency of any cause or matter, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just. For the manner in which the court exercises its discretion under this rule reference should be made to *Kearsley* v. *Phillips* (*h*), *Pickering* v. *Pickering* (*i*), and other cases cited in the notes to the rule in the "Annual Practice."

§ 625 A. 3. Again, by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 58, the court or a judge was empowered to grant to either party to an action a rule or order for the inspection by the

(*e*) *Bluck* v. *Gompertz*, 7 Exch. 67; *Doe* d. *Child* v. *Roe*, 1 E. & B. 279; *Shadwell* v. *Shadwell*, 6 C. B. N. S. 679.

(*f*) *Hunt* v. *Hewitt*, 7 Exch. 236; *Scott* v. *Walker*, 2 E. & B. 555.

(*g*) Order XXXI. Rule 14.

(*h*) *Kearsley* v. *Phillips*, 10 Q. B. 465, C. A.

(*i*) *Pickering* v. *Pickering*, 25 Ch. D. 247.

jury, or by himself, or by his witnesses, of any real or personal property, the inspection whereof might be material to the proper determination of the question in dispute. And it was held that this section gave, as ancillary to the power to order inspection, the same power to order the removal of obstructions with a view to inspection, as was exercised by courts of equity in like cases (*l*).

This power of inspection has, as we have seen, been continued and extended by the "Rules of the Supreme Court" (*m*).

§ 626. 4. By the Patents, Designs, and Trade Marks Act, 1883, 46 & 47 Vict. c. 57, s. 30, re-enacting s. 42 of the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, it is provided that in an action for the infringement of a patent, the court or a judge may, on the application of either party, make such order for inspection, and impose such terms, and give such directions respecting the same, and the proceedings thereon, as the court or a judge may see fit.

§§ 627–629. 5. In providing for the compulsory discovery of evidence from litigants before trial, the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, not only supplied deficiencies in 14 & 15 Vict. c. 99, but introduced an entirely new machinery into the common-law system of evidence and forensic procedure, by authorising either party to a cause in any of the superior courts — *by leave of the court* and subject to the provisions in that behalf contained in that statute (*q*) — to deliver to the other interrogatories in writing upon any matter as to which discovery might be sought.

The Rules of the Supreme Court which replaced these statutory provisions at first (*r*) allowed either party, *without leave of the court* within a limited time, and with leave at any time, to deliver interrogatories to and obtain discovery from the opposite party. But subsequently (*s*), it having been found that this unchecked liberty of interrogation greatly increased the expense of interlocutory proceedings, the right of administering interrogatories without leave was limited to actions for fraud, or breach of trust, and the leave of the court or a judge was required in all other cases (*t*); while the party interrogating became bound, unless it should be otherwise ordered, to pay at least 5*l.* into court by way of security for the expense caused (*t'*). For the numerous cases on these rules, reference should be made to the "Annual Practice."

(*l*) *Bennett* v. *Griffiths*, 3 E. & E. 467.
(*m*) Order L., Rules 3–5, *supra*, § 197.
(*q*) See sects. 51–57.
(*r*) In 1875, when the Judicature Acts and the Rules under them first came into operation.
(*s*) In 1883, when the Rules were consolidated and amended by the light of the recommendations of a "Legal Procedure Committee."
(*t*) Order XXXI. Rule 1.
(*t'*) Order XXXI., Rules 25–27 A.

The Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, — which establishes the Court for Divorce and Matrimonial Causes, and directs (*b*) that the rules of evidence observed in the superior courts of common law at Westminster shall be applicable to, and observed in the trial of all questions of fact in that court, — contains provisions for the interrogation of the parties to the suit in certain cases (*c*).

County Courts. Interrogatories may also be administered in a County Court action (*c'*), the procedure with respect to interrogatories having been made in 1886, substantially uniform with the procedure in the Supreme Court (*c''*).

§ 630. 6. The expense of proving documents which are formal in their nature, and not likely to be made the subject of dispute, was long felt to be a grievance. For remedy whereof, certain provisions were inserted in the *Regulæ Generales*, of Hilary Term, 4 Will. 4 (*d*), and afterwards in the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 117. And now, by the "Rules of the Supreme Court" (*e*), either party may call on the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless, at the hearing or trial, the court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

And, by another rule, any party to an action may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole, or any part of the case of any other party (*f*).

(*b*) Sect. 48.
(*c*) Sects. 43, 46.
(*c'*) County Court Rules, 1889. Order XVI.
(*c''*) See Heywood's County Court Practice, ch. ix.
(*d*) See Rule 20, "Practice."
(*e*) Order XXXII. Rule 2.
(*f*) Order XXXII. Rule 1.

AMERICAN NOTES.

(§ 624) Production of Private Documents.— (*a*) *At Common Law.* — Two methods for compelling production of documents in which a party litigant has an interest are known to the common law, varying as the party in possession of such document is a party to the suit or a stranger: (1) By bill of discovery in equity as to documents in the possession or control of the adverse party, demand and refusal to produce giving at law simply the right to introduce secondary evidence of contents. Adams, Equity, pp. 1–26; 1 Story, Eq. Juris. 71, 72; Thompson *v.* Erie R. R. Co., 9 Abb. (N. Y.) Prac. N. S. 212, 230; Howell *v.* Ashmore, 9 N. J. Eq. 82; Erie R. R. *v.* Heath, 8 Blatch. 413. See Bank of Utica *v.* Hillard, 6 Cowen, 62. That a party refusing to produce a document, when duly notified to produce it, will not afterwards be allowed to use the same as evidence without the consent of the demanding party, see Doon *v.* Donaher, 113 Mass. 151. A party, however, may, by order of court, obtain inspection of any documents which, by incorporation in the pleadings or otherwise, are within the control of the court. Hilyard *v.* Harrison, 37 N. J. L. 170, 173. (2) In case such document is in the control of a third person, the legal process of a *subpœna duces tecum* has continued to be the usual practice. Lane *v.* Cole, 12 Barb. 680; Chaplain *v.* Briscoe, 5 Sm. & G. 198; Bull *v.* Loveland, 10 Pick. 9, 14; Erie R. R. Co. *v.* Heath, 8 Blatch. 413. But no witness will be compelled to furnish documents tending to criminate himself. Bank of Utica *v.* Hillard, 5 Cowen, 419; Byass *v.* Sullivan, 21 How. (N. Y.) Prac. 50; U. S. *v* Reyburn, 6 Pet 352, 367. See Hawkins *v.* Sumter, 4 Desaussure (S. C.), 446. So also the rule making professional communications privileged extends to documentary evidence. Crosby *v.* Berger, 11 Paige (N. Y.), Ch. 377; Jackson *v* Burtis, 14 Johns. 391; Durkee *v.* Leland, 4 Vt. 612; Lynde *v.* Judd, 3 Day, 499. So of state papers and communications. Gray *v.* Pentland, 2 S. & R. 23.

These rules apply only to *private* documents. For a consideration of public documents, see § 485, n. 1, *supra.*

(*b*) *By Statute.* — Statutory provisions, enforced by the sanctions of nonsuit or default, as the case may be, frequently compel direct production by a party at law of documents under his control. 1 Greenl Ev. §§ 558–560. See 1 U. S. Stat. at Large, 82; Iasigi *v.* Brown, 1 Curtis, C. Ct. 401; Dunham *v.* Riley, 4 Wash. C. Ct. 126; Gould *v.* McCarty, 11 N. Y. 575; Lefferts *v.* Brampton, 24 How. (N. Y.) Prac. 257.

CHAPTER II.

TRIAL AND ITS INCIDENTS.

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§ 631. I. HAVING, in the first Book, explained the nature of our common-law tribunal for the trial of facts, and the respective functions of judge and jury (*a*), we will now proceed shortly to describe the course of a trial. The proceedings commence with a short statement to the jury of the questions they are about to try. In civil cases this statement is made by the plaintiff if he appears in person, by his counsel if he appears by counsel, and by his junior counsel if he has more than one; and it is technically termed "opening the pleadings." In criminal cases a summary of the charge against the accused, together with his plea thereto, and the issue joined, is stated to the jury by the officer of the court, and in some cases (*b*) by the counsel for the prosecution. If there be any question as to which of the contending parties ought to begin, the judge decides that question,

(*a*) Bk. 1, pt. 1, §§ 82 *et seq.*

(*b*) *I. e.*, in misdemeanours.

and the party who has that right then, either by himself or his counsel, states his case to the jury, and afterwards adduces his evidence in support of it. In criminal cases, where no counsel is employed for the prosecution, the prosecutor cannot address the jury, and the evidence is gone into at once; for in contemplation of law the suit is that of the sovereign (*c*). The opposite party is then heard in like order. If he adduces evidence, the opener has a right to address the jury in reply; but in prosecutions where the Attorney-General appears officially, and in proceedings in the Exchequer for penalties, he, or his representative, has a right to reply whether evidence is adduced or not (*d*). In addressing the jury, a party has no right to state facts which he does not intend to call evidence to prove (*e*); and when this rule is violated, the judge may, in his discretion, allow a reply (*f*). Where a fresh case — *i. e.*, a case not merely answering the case of the party who began — is set up by the responding party, and evidence is adduced to support such fresh case, the party who began may give proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener has a general reply on the whole case. By the Rules of the Supreme Court, Order XXXVI. Rule 36, replacing s. 18 of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, "Upon the trial with a jury the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as heretofore;" and 28 & 29 Vict. c. 18, s. 2, enacts, that "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every

(*c*) Bk. 2, pt. 1, ch. 2, §§ 169, 183.

(*d*) Resolutions of the judges, 7 C. & P. 676, Res. 5; *R.* v. *Horne*, 20 How. St. Tr. 660–664; *R.* v. *Radcliffe*, 1 W. Bl. 3; *R.* v. *Marsden*, 1 Mood. & M. 439.

(*e*) Bk. 1, pt. 1, § 94, and *infrà*.

(*f*) *Crerar* v. *Sodo*, 1 Mood. & M. 85; *Faith* v. *M'Intyre*, 7 C. & P. 44. The notion that this may be claimed as a *right* cannot be supported.

trial for felony or misdemeanour, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." The party against whom real or documentary evidence is adduced has a right to inspect it; and such evidence can be read to, or laid before the jury, only if no valid objection to it appears. Every witness called is first examined by the party calling him, and this is denominated his "examination in chief." If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the *voir dire* (*g*). The party against whom any witness is examined has a right to "cross-examine" him; after which the party by whom he is called may "re-examine" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. The court, generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of receiving proofs, but may in its discretion dispense with them in favour of parties or counsel. During the whole course of the trial, the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the judge must determine that fact, and for this purpose go into proofs, if necessary (*h*).

§ 632. The common-law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable exception; *i. e.*, in cases of persons indicted or impeached for treason or felony. It was otherwise in prosecutions for misdemeanour (*i*); as also in appeals of felony (*j*); and even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matters, — such as pleas to the jurisdic-

(*g*) Bk. 2, pt. 1, ch. 2, § 133, and bk. 2, pt. 2, ch. 3, § 490.

(*h*) Bk. 1, pt. 1, § 82.

(*i*) 6 How. St. Tr. 797.

(*j*) Doct. & Stud. Dial. 2, ch. 48; 9 Edw. IV. 2 A, pl. 4; 8 How. St. Tr. 726; Staundf. Pl. Cor. lib. 2, c. 63.

tion (*k*), pleas of sanctuary (*l*), or of autrefois acquit (*m*), the trial of error in fact to reverse outlawry (*n*), issues on identity when brought up to receive judgment (*o*), &c. And even on the trial of the general issue, if a point of law arose which the court considered doubtful, they assigned the accused counsel to argue it on his behalf (*p*).

§ 633. It is not worth while to discuss the origin of this practice, — whether it formed part of the ancient common law, or, like many other abuses, crept in gradually (*z*). We certainly find the practice clearly stated as above, so early as the reign of Edward the Fourth (*a*); and from thence down to the alteration of the law after the Revolution of 1688, the prayer of the prisoner to be allowed to be defended by counsel, and the refusal of it by the court, formed the regular prologue to a state trial (*b*). At that period a heavy blow was aimed at the established practice by the stat. 7 & 8 Will. 3, c. 3, which, after reciting that "nothing is more just and reasonable than that persons prosecuted for high treason and misprision of treason, whereby the liberties, lives, honour, estates, blood, and posterity of the subjects may be lost and destroyed, should be justly and equally tried, and that persons accused as offenders therein should not be debarred of all just and equal means for defence of their innocencies in such cases," enacts that every person so accused shall be admitted to make their full defence by counsel. And by 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51, s. 1, treasons, where the overt act charged is the actual assassination of the sovereign, or other offence against his person, are to be tried in every respect as if the accused stood charged with murder.

§ 634. Although the 7 & 8 Will. 3, c. 3, did not extend to cases of felony, yet a practice gradually grew up during the last century which continued until the reign of William the Fourth; by which the counsel for a prisoner were allowed to advise him during his trial; to take points of law in his favour; to examine and cross-examine witnesses on his behalf; and, in short, to do everything except address the jury in his defence. But by 6 & 7 Will. 4, c. 114, the whole anomaly was removed. That statute, after reciting that "it is

(*k*) 11 How. St. Tr. 523–526.

(*l*) *Humphrey Stafford's case*, 1 Hen. VII. 26 A.

(*m*) 41 Ass. pl. 9.

(*n*) *Burgesses case*, Cro. Car. 365.

(*o*) *Ratcliffe's case*, Fost. Cr. Law, 40; 18 How. St. Tr. 434.

(*p*) 9 Edw. IV. 2 A, pl. 4; 1 Hen. VII. 26 A; Staundf. Pl Cor. lib. 2, c. 63; 2 Hawk. P. C. 401.

(*z*) Vide Mirrour of Justices, ch. 3, sect. 1; and Doct. & Stud. Dial. 2, ch. 48.

(*a*) 9 Edw. IV. 2, pl. 4. See also per Gascoigne, C. J., 7 Hen. IV. 35 b, pl. 4.

(*b*) See the State Trials, passim. Several of these cases are collected, 5 How. St. Tr. 466 *et seq.* (note).

just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts in its first section that "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorneys practise as counsel."

§ 635. In construing this statute several judges ruled that, when an accused person defends himself he may state in his defence what facts he thinks proper, and although he adduces no evidence to prove them, the jury may weigh the credit due to his statement; but that counsel who defend prisoners are bound by the rule of practice in civil cases; viz., only to state such facts as they believe they are in a condition to establish by evidence (*b'*). According to this dogma, when a prisoner's defence rests, as it often necessarily must rest, on an explanation of apparently criminating circumstances, his employing counsel causes his defence to be suppressed, — a state of things hardly contemplated by the framers of the statute, and certainly at variance with the principles of natural justice. It was sought to defend this anomalous proceeding on the ground that the counsel for the accused may put his client's defence before the jury in a hypothetical form; but how feebly does this tell in comparison with a straightforward explanation! Some judges sought to qualify the rule, by allowing the accused to make a statement of the facts he deems essential, leaving it to be commented on by his counsel; but this course was not followed by other judges, and although perhaps there is a preponderance of authority in favour of the prisoner, the practice on the subject was for a long time unsettled (*c*). Early in the year 1882, however, the judges agreed to a rule unfavourable to prisoners defended by counsel (*d*). It is worthy of observation that in cases of treason the prisoner is not only allowed, but invited

(*b'*) *R.* v. *Beard*, 8 C. & P. 142; *R.* v. *Butcher*, 2 M. & Rob. 229.

(*c*) *R.* v. *Malings*, 8 C. & P. 242; *R.* v. *Walkling*, *Id.* 243; *R.* v. *Clifford*, 2 Car. & K. 206; *R.* v. *Manzano*, 2 F. & F. 64. See also *R.* v. *Haines*, 1 F. & F. 86; *R.* v. *Taylor*, *Id.* 535; Solicitors' Journal for November 12th, 1881.

(*d*) This rule, which has not been committed to writing, was promulgated by North, J., at the Reading Assizes in January, 1882, the announcement being "that the practice followed by some counsel defending prisoners of stating facts in their behalf without proving them by evidence had been under the consideration of the judges, and they had agreed that the practice ought not to be encouraged, and that counsel should not be allowed to make statements which could not be proved by competent witnesses." See Solicitors' Journal for January 21st, 1882. The rule is believed to owe its origin to the unsupported statement of counsel defending one Lefroy on a trial, in November, 1881, for a railway murder (of which the prisoner was convicted and for which he was executed), that the prisoner had engaged to meet a young lady (whose name was not stated) on the day of the murder.

by the court, to address the jury after his counsel have spoken for him (*e*).

§ 636. II. Amongst the principal incidents of a trial — the second part of our subject — the first which requires particular notice is the practice of ordering witnesses out of court. When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel, or the evidence given by other witnesses, the ends of justice require that they be examined apart; and the court will proprio motu, or on the application of either party, order all the witnesses except the one under examination to leave court. This practice is probably coeval with judicature. "Si necessitas exegerit," says Fortescue (*f*), "dividantur testes, donec ipsi deposuerint quic quid velint, ita quod dictum unius non docebit, aut concitabit eorum alium ad consimiliter testificandum." The better opinion, however, seems to be that this is not demandable *ex debito justitiæ* (*g*); and there may be cases where it would be judicious to refuse it.[1] It is said that the rule does not extend to the parties in the cause (*h*), nor, at least in general, to the solicitors engaged in it (*i*). A witness who disobeys such an order is guilty of contempt;[2] but the judge cannot refuse to hear his evidence (*k*),[3] although the circumstance is matter of remark to the jury. In revenue cases in the Exchequer, indeed, it is said that his evidence is imperatively excluded (*l*). And in order to prevent communication in such cases, between witnesses who have been

(*e*) See *R.* v. *Watson*, 32 How. St. Tr. 538; *R.* v. *Thistlewood*, 33 *Id.* 894; *R.* v. *Collins*, 5 C. & P. 211; *R.* v. *Frost*, 9 *Id.* 161, &c. &c. In *R.* v. *O'Coigly*, 26 How. St. Tr. 1191, 1374, Buller, J., gave the prisoners the option of addressing the court, either before or after their counsel had spoken.

(*f*) C. 26.

(*g*) See the authorities collected, Tayl. Ev. § 1259.

(*h*) *Charnock* v. *Dewings*, 3 Car. & K. 378; *Constance* v. *Brain*, 2 Jur. N. S. 1145; *Selfe* v. *Isaacson*, 1 F. & F. 194.

(*i*) *Pomeroy* v. *Baddeley*, Ry. & M. 430; *Everett* v. *Lownham*, 5 Car. & P. 91.

(*k*) *Chandler* v. *Horne*, 2 Moo. & R. 423; *Cook* v. *Nethercote*, 6 C. & P. 743, and the cases there referred to; and per Lord Campbell, delivering the judgment of the court in *Cobbett* v. *Hudson*, 1 Ell. & B. 11, 14.

(*l*) Rosc. Cr. Ev. 127–128, 6th Ed.; 1 Greenl. Ev. § 432, 7th Ed.; and Tayl. Ev. § 1260, 4th Ed.

[1] The same is substantially the American law. Benaway *v.* Conyne, 3 Chand. 214; Errissman *v.* Errissman, 25 Ill. 136; Porter *v.* State, 2 Ind. 435; State *v.* Fitzsimmons, 30 Mo. 236; Wilson *v.* State, 52 Ala. 299; Nelson *v.* State, 2 Swan (Tenn.), 237; People *v.* Green, 1 Parker, C. R. 11; State *v.* Sparrow, 3 Murph. (N. C.) 487, acc.; Gregg *v.* State, 3 W. Va. 705, *contra.*

[2] So of the American cases. Bell *v.* State, 44 Ala. 393; Grimes *v.* Martin, 10 Ia. 347, acc.

[3] The American cases are in conflict. See Gregg *v.* State, 3 W. Va. 705; Keith *v.* Wilson, 6 Mo. 435; Davenport *v.* Ogg, 15 Kans. 363; People *v.* Buscovitch, 20 Cal. 436; State *v.* Salge, 2 Nev. 321, acc. But see Laughlin *v.* State, 18 Ohio, 99; Sartorious *v.* State, 26 Miss. 602, *contra.* See also Jackson *v.* State, 14 Ind. 327.

examined and those awaiting examination, it is a rule that the former must remain in court until the latter are examined. But where the first witness examined was a respectable female, and some indelicate evidence was expected to be given by the other witnesses, it was arranged that she should be taken out of court, and kept under observation in a separate apartment (*m*).

§ 637. Next, with respect to the order of beginning, or ordo incipiendi. This is known in practice as the "right to begin," not a very accurate expression, for it assumes that beginning is always an advantage, whereas it may be quite the reverse. There are few heads of practice on which a larger number of irreconcilable decisions have taken place. It is sometimes said that as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burden of proof, if it appears on the statement of the pleadings, or whatever is analogous thereto, that the plaintiff has nothing to prove, — that the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim, — he ought to be allowed to begin, as the burden of proof then lies on him. The authorities on this subject present almost a chaos. Thus much only is certain, that if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin (*n*); and it seems that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here also the defendant may begin (*o*). But the difficulty is, where the burden of proving the issue, or all the issues, if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of *Cotton* v. *James* (*p*), in 1829, established the position that the onus of proving damages made no difference, and that under such circumstances the defendant ought to begin. Of these the most remarkable is that of *Cooper* v. *Wakley* (*q*), in 1828; where it was held by Lord Tenterden, C. J.,

(*m*) *Streeten* v. *Black*, Guildf. Sum. Ass. 1836, cor. Lord Abinger, C. B., MS.

(*n*) *Wood* v. *Pringle*, 1 Moo. & R. 277; *James* v. *Salter*, *Id.* 501; *Curtis* v. *Wheeler*, 4 C. & P. 196; *Williams* v. *Thomas*, *Id.* 234.

(*o*) *Fowler* v. *Coster*, 1 Moo. & M. 241.

(*p*) 3 C. & P. 505; 1 Moo. & M. 273.

(*q*) 3 C. & P. 474; 1 Moo. & M. 248.

and Bayley, Littledale, and Parke, JJ., that in an action by a surgeon for libel, in imputing to him unskilfulness in performing a surgical operation, if the defendant pleads a justification he is entitled to begin. Thus matters stood until the case of *Carter* v. *Jones* (*r*), in 1833, which also was an action for libel, to which a justification was pleaded; and on the right to begin being claimed by the defendant, Tindal, C. J., before whom the case was tried, said that a rule on the subject had been come to by the judges. He then stated *verbally* the nature of that rule, but his language is given very differently in the two reports of the case. In Carrington & Payne, it is reported thus: "The judges have come to a resolution that justice would be better administered by altering the rule of practice in the respect alluded to, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant. . . . It is most reasonable that the plaintiff, who brings the case into court, should be heard first to state his complaint." In Moody & Robinson, it is reported thus: "A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." As might have been expected, many questions arose relative to the extent of this rule, and especially its applicability to actions of contract; but a new light was thrown on the whole subject by the case of *Mercer* v. *Whall* (*s*), which came before the Court of Queen's Bench in 1845; in which Lord Denman, C. J., in delivering the judgment of the court, stated (*t*), that the rule promulgated by Chief Justice Tindal in *Carter* v. *Jones* had originally been reduced to writing, and signed with the initials of several of the judges, and was then in his own possession; that its terms were, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant;" and that that rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old, which had been broken in upon by *Cooper* v. *Wakley*, and that class of cases (*u*). Since *Mercer* v. *Whall*, the subject seems to have been better understood; and whether the rule in *Carter* v. *Jones* is to be considered as declaratory or enacting, it certainly is a great step in the right direction, of resorting to the

(*r*) 6 C. & P. 64; 1 Moo. & R. 281.

(*s*) 5 Q. B. 447.

(*t*) *Id.* 462.

(*u*) It is remarkable that in all the cases decided on the construction of this rule, between 1833 and 1845, and they are very numerous, not a single expression of any judge is to be found, implying that it was declaratory in its nature.

plaintiff, his natural "right to begin," whenever he really has anything to prove. At the trial of a proceeding by scire facias to repeal letters patent, the defendant is by statute entitled to begin, and to give evidence in support of the letters patent (*v*).

§ 638. Much of the confusion and inconsistent ruling on this subject may be traced to a notion which formerly prevailed; viz., that the order of beginning was exclusively to be determined by the judge at nisi prius, and that, consequently, the court in banc would not interfere to rectify any mistake, however gross, which might be committed in this respect (*x*). It would, it was argued, lead to much litigation and vexation if motions for new trials were entertained on such a ground; especially as, since the wrong decision of the judge would in all likelihood be founded on a misconception of the onus probandi, he would carry that erroneous view into his direction to the jury, in which case a new trial would be grantable ex debito justitiæ for an inversion of the burden of proof. But in many cases the fact of allowing the wrong party to begin, might be productive of the greatest mischief, although followed by an unimpeachable summing-up. And a series of authorities has now settled, that where the ruling of the judge, with reference to the right to begin, is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment (*y*).

§ 639. The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal, and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one; if he has only slight evidence, or perhaps none at all to adduce in support of it; and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own intrinsic weakness; or trusting to the effect of an address to the jury, — the fact of his having to begin might prove instantly fatal to his cause. Thus in *Edwards* v. *Jones* (*z*), which was an action by the

(*v*) *E. g.*, 15 & 16 Vict. c. 83, s. 41.

(*x*) *Bird* v. *Higginson*, 2 A. & E. 160; *Burrel* v. *Nicholson*, 1 Moo. & R. 304; *Ashby* v. *Bates*, 15 M. & W. 596, per Rolfe, B.

(*y*) *Geach* v. *Ingall*, 14 M. & W. 95; *Edwards* v. *Matthews*, 11 Jur. 398; *Brandford* v. *Freeman*, 5 Exch. 734; *Leete* v. *The Gresham Life Insurance Society*, 15 Jur. 1161; *Ashby* v. *Bates*, 15 M. & W. 589; *Booth* v. *Millns*, *Id.* 669; *Huckman* v. *Fernie*, 3 M. & W. 505 (as corrected in *Booth* v. *Millns*, *Edwards* v. *Matthews*, and *Brandford* v. *Freeman*); *Mercer* v. *Whall*, 5 Q. B. 447; *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 C. & P. 736; *Doe* d. *Bather* v. *Brayne*, 5 C. B. 665.

(*z*) 7 C. & P. 633.

indorsee against the maker of a promissory note, to which the defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the plaintiff replied, that there had been a good consideration given for the note, and to the rest entered a nolle prosequi; the judge having ruled that the defendant should begin, his counsel was obliged to admit that he had no witnesses; and the judge immediately directed the jury to find a verdict against him.

§ 640. 3. We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases (*a*), and in accordance with a recent rule, the counsel for accused parties in criminal cases (*b*), from stating any facts to the jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to any facts of which the court takes judicial cognisance, or the notoriety of which dispenses with proof (*c*). But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence, to prove a matter relating to the kingdom at large (*d*); probably for the same reason that the law permits matters of public and general interest to be proved by the declarations of deceased persons, who may be presumed to have had competent knowledge on the subject; or by old documents which, under ordinary circumstances, would be rejected for want of originality (*e*); although there are cases to be found in the books, where histories have been received in evidence, and which it might be difficult to support on this principle (*f*). But a history is not receivable to prove a private right or particular custom (*g*). In a recent case (*h*), it was held by the Court of Exchequer that counsel, or a party at a trial, may refer to matters of general history, provided the licence be exercised with prudence, but cannot refer to particular books of history, or read particular passages from them, to prove any fact relevant to the cause. Also that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause. And Sir Edward Coke lays

(*a*) *Suprà*, §§ 631, 635.
(*b*) *Suprà*, § 635.
(*c*) Bk. 3, pt. 1, ch. 1, §§ 252–254.
(*d*) B. N. P. 248; 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.
(*e*) Bk. 3, pt 2, ch. 4, §§ 497, 499.
(*f*) See 2 Phill. Ev. 155–156, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.
(*g*) 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.
(*h*) *Darby* v. *Ouseley*, 2 Jur. N. S. 497; 1 H & N. 1.

down, "Authoritates philosophorum, medicorum, et poetarum, sunt in causis allegandæ et tenendæ" (*i*).

§ 641. 4. The chief rule of practice relative to the interrogation of witnesses is that which prohibits "*leading* questions;" *i. e.*, questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination in chief.[1] This seems based on two reasons: First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole (*k*). On all matters, however, which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose. It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue (*l*); but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable; as if, on a traverse of notice of dishonour of a bill of exchange, a witness were led either as to the fact of giving the notice, or as to the time when it was given. So leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, to ask a witness whether he saw the accused, covered with blood and with a knife in his hand, coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit, consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other

(*i*) Co. Litt. 264 a.
(*k*) Ph. & Am. Ev. 887; 2 Phill. Ev. 461, 10th Ed.
(*l*) Rosc. Crim. Ev. 130, 6th Ed.

[1] For the American doctrine as to leading questions, see *infra*, p 599.

side; or where the opposing counsel does not think it worth his while to object.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned. *E. g.*, on a question whether A. and B. were partners, it has been held not a leading question to ask if A. has interfered in the business of B. (*m*); for even supposing he had, that falls far short of constituting him a partner. In an action for slander (*n*), in saying of a tradesman that "he was in bankrupt circumstances, that his name had been seen in a list in the Bankruptcy Court, and would appear in the next Gazette," a witness — having deposed to a conversation with the defendant, in which he made use of the first two of these expressions — was asked, "Was anything said about the Gazette?" This was objected to as leading, but was allowed by Tindal, C. J. So, although there is no case where leading should be avoided more than when it is sought to prove a confession, still a witness who deposes to a conversation with the accused, may, after having first exhausted his memory in answering the question, What took place at it? be further asked, whether anything was said on such a subject; *i. e.*, on the subject-matter of the indictment. It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract, — for the identical form of question which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.

§ 642. There are some exceptions to the rule against leading. 1. For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. 2. Where one witness is called to contradict another as to expressions used by the latter, but which he denies having used, he may be asked directly, Did the other witness use such and such expressions (*o*)? The authorities are not quite agreed as to the reason of this exception (*p*); and some strongly contend that the memory of the second witness ought first to be exhausted by his being asked what the other said on the occasion in question (*q*). 3. The rule which excludes leading questions being chiefly founded on the assumption that a witness must be taken to have a bias in favour of the party by whom he is

(*m*) *Nicholls* v. *Dowding*, 1 Stark. 81.

(*n*) *Rivers* v. *Hague*, C. B. Sittings after Mich. Term, 1837, MS.

(*o*) *Edmonds* v. *Walter*, 3 Stark. 7.

(*p*) *Courteen* v. *Touse*, 1 Campb 43; *Hallett* v. *Cousens*, 2 Moo. & R. 238.

(*q*) Ph. & Am. Ev. 889; 1 Phill. Ev. 463, 10th Ed.

called, whenever circumstances show that this is not the case, and that he is either hostile to that party or unwilling to give evidence, the judge may in his discretion allow the rule to be relaxed (*r*). And it would seem that, for the same reason, if the witness shows a strong bias in favour of the cross-examining party, the right of leading him ought to be restrained; but the authorities are not quite clear about this (*s*). 4. The rule will be relaxed where the inability of a witness to answer questions put in the regular way, obviously arises from defective memory; or 5. From the complicated nature of the matter as to which he is interrogated.

§ 643. Although not to lead one's own witness when that is allowable, is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate. There are, however, cases where it is advisable not to lead under such circumstances. Thus on a criminal trial, where the question turns on identity, although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight.

§ 644. 5. One of the chief rules of evidence, as has been shown, is, that no evidence ought to be received which does not bear, immediately or mediately, on the matters in dispute (*t*).[1] As a corollary from this, all questions tending to raise collateral issues, and all evidence offered in support of such issues, ought to be rejected. But many difficulties arise in practice as to what shall be deemed a collateral issue with reference to the credit of witnesses. In addition to counter-proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness (*t'*): 1. By giving evidence of his general bad character for veracity; *i. e.*, the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath. And here the inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts cannot be gone into (*u*). "There are two reasons," says Parke, B., in the *Attorney-General* v. *Hitchcock* (*x*), "why collateral questions, such

(*r*) Ph. & Am. Ev. 888; 2 Phill. Ev. 462, 10th Ed.

(*s*) See Rosc. Crim. Ev. 131, 6th Ed.; 2 Phill. Ev. 472-473, 10th Ed.; Tayl. Ev. § 1288, 4th Ed.

(*t*) Bk. 3, pt. 1, ch. 1.

(*t'*) See also §§ 130 and 263.

(*u*) Bk. 3, pt. 1, ch. 1.

(*x*) 11 Jur. 478, 479.

[1] The American cases are given, *infra*, at p. 600.

as a witness having committed some particular crime, cannot be entered into at the trial. One is that it would lead to complicated issues and long inquiries without notice; and the other that a man cannot be expected to defend all the acts of his life." And Alderson, B., in his judgment in that case (*y*), says: "The inconvenience of asking a witness about particular transactions, which he might have been able to explain if he had had reasonable notice that he would be required to do so, would be great: a man does not come into the witness-box prepared to show that every act of his life has been perfectly pure; and you therefore compel the opposite party to take his answer relative to the matter imputed, as otherwise you might go on to try a collateral issue; and if you were allowed to try the collateral issue of the witness having committed some offence, you might call witnesses to prove that fact, and they again might likewise be cross-examined as to their own conduct; and so you might go on proving collateral issues without end, before you could come to the main one. The rules of evidence stop this in the first instance, for the more convenient administration of justice; and you must therefore take the witness's answer, and indict him for perjury if it is false." 2. By showing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause; for a witness cannot be contradicted on collateral matters (*z*). The 17 & 18 Vict. c. 125, s. 23, enacts: "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." And this enactment, which was originally applicable only to courts of civil judicature, has now, by the 28 & 29 Vict. c. 18. ss. 1 and 4, been extended to all courts of judicature, as well criminal as all others; and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence. 3. By proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the contending parties (*a*). Thus it may be proved that a witness has been bribed to give his evidence (*b*),

(*y*) P. 481.

(*z*) 1 Stark. Ev. 189, 3rd Ed.; 2 Phill. Ev. 517 *et seq.*, 10th Ed.

(*a*) There are some authorities to the contrary; but they seem overruled by the *Attorney-General* v. *Hitchcock*, 1 Exch. 91, 11 Jur. 478, and the cases there cited; and are indefensible on principle.

(*b*) *Langhorn's case*, 7 How. St. Tr 446, recognised in the *Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478.

or has offered bribes to others to give evidence for the party whom he favours (*c*), or that he has used expressions of animosity and revenge towards the party against whom he bears testimony (*d*), &c. We must also direct attention to the following observations of Parke, B., in the *Attorney-General* v. *Hitchcock* (*e*): "Under the old law, when an objection was raised to the competency of a witness, he might be examined as to it on the voir dire, and evidence might be adduced to contradict his statement; and the issue thus raised was determined by the judge. . . . At that time those objections went to the disability of the witness; but it becomes an important question whether the same course should be adopted now, since Lord Denman's Act, 6 & 7 Vict. c. 85, has provided, that no person shall be excluded from giving evidence by reason of incapacity from crime or interest, — is all evidence of his being interested to be excluded from the view of the jury?" This suggestion does not, however, appear to be followed in practice.

§ 645. 6. With respect to the right of a party to discredit his own witnesses. We will consider the matter, first, as it stood at the common law, and secondly, under the 17 & 18 Vict. c. 125, and 28 & 29 Vict. c. 18. First, then, of the common law. It was an established rule that a party should not be allowed to give *general* evidence to discredit his own witness; *i. e.*, general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, this is not only mala fides towards the tribunal, but, say the books, it "would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him with the means in his hand of destroying his credit if he spoke against him" (*f*). A party might, however, discredit his own witness *collaterally*, by adducing evidence to show that the evidence which he gave was untrue in fact (*g*). This does not raise the slightest presumption of mala fides; and it would be in the highest degree unjust and absurd if parties were bound by the unfavourable statements of witnesses with whom they may have no privity, and who are frequently called by them from pure necessity. But whether it was competent for a party to show that his own witness had made statements out of court inconsistent with

(*c*) *Lord Stafford's case*, 7 How. St. Tr. 1400, recognised in *The Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*d*) *Yewin's case*, 2 Camp. 638. See ad id. *The Attorney-General* v. *Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*e*) 11 Jur. 478, 480.

(*f*) B. N. P. 297; 2 Phill. Ev. 525, 10th Ed.

(*g*) 2 Phill. Ev. 526, 10th Ed.

the evidence which he had given in it, was an unsettled point, on which, however, the weight of authority was in favour of the negative (*h*). On the one hand it was urged that this falls within the principle of the general rule, that a party must not be allowed directly to discredit his own witness (*i*); that to admit proof of contradictory statements would tend to multiply issues; that it would enable a party to get the naked statement of a witness before the jury, operating in fact as substantive evidence (*k*); that there would be some danger of collusion and dishonest contrivance, inasmuch as a witness might be induced to make a statement out of court, for the very purpose of its being reserved, and afterwards used to contradict him; and that the jury might regard such a statement as substantive evidence in the cause. Moreover, the use of oaths and the other sanctions of truth is to extract facts which parties might be willing to conceal; and the allowing a witness to be thus contradicted holds out an inducement to him to maintain by perjury *in* court any false or hasty statements he may have made *out* of it. The following reasoning on the other side is taken from a work of authority (*l*): "It may be argued, the evidence is not open to the objection that the party would thus discredit his own witness by general testimony; that although a party who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character, yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary, as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favourable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that the rule, with the above exception as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other; and that the danger of the jury's treating the contradictory matter as substantive testimony is the same in both cases; that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked that this is a question in which not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained by allowing a free and ample scope for

(*h*) See the cases collected, Tayl. Ev. § 1049, 1st Ed.; 2 Phill. Ev. 528 *et seq.*, 10th Ed.; and *Melhuish* v. *Collier*, 15 Q. B. 878.

(*i*) Ph. & Am. Ev. 904.

(*k*) Tayl. Ev. § 1048, 1st Ed.

(*l*) Ph. & Am. Ev. 905.

scrutinising evidence and estimating its real value; and that in the administration of criminal justice more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." Besides, it by no means follows that the object of a party in contradicting his own witness is to impeach his veracity; it may be to show the faultiness of his memory (*m*).

In this state of the law the 17 & 18 Vict. c. 125, s. 22, was passed, — which was originally applicable only to civil courts (*n*), but has since been extended (*o*) to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, and which enacts that "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." The term "adverse" in this section must be understood in the sense of the witness exhibiting a *hostile mind* towards the party calling him, and not merely in the sense that his testimony turns out to be "unfavourable" to that party (*p*); and a statement contradicting the evidence of a witness under it may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of the witness (*q*). The discretion of the judge under the section is absolute, and not subject to review by the court (*q'*).

§ 646. 7. While the indefinite, or even frequent adjournment of its proceedings, is at variance with the very nature of a judicial tribunal (*r*), still a power of adjournment in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. As regards criminal cases, it is said that it is incident to a criminal trial that the court may, for sufficient reason, adjourn it (*s*). But this rule was recognised in civil cases, until 1854, when by the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 19, a power of adjournment was given to the court by an enactment substantially reproduced by the "Rules of the

(*m*) Tayl. Ev. § 1047, 1st Ed.
(*n*) See sect. 103.
(*o*) 28 & 29 Vict. c. 18, ss. 1, 3.
(*p*) *Greenough* v. *Eccles*, 5 C. B. N. S. 786.
(*q*) *Jackson* v. *Thomason*, 1 B. & S. 745.
(*q'*) *Rice* v. *Howard*, 16 Q. B. D. 681.
(*r*) Introd pt. 2, §§ 41 *et seq.*
(*s*) Per Blackburn, J., *R.* v. *Castro*, L. Rep., 9 Q. B. 350, 356.

Supreme Court" under which the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit (*u*).

§ 647. 8. There were formerly two ways of questioning the ruling of a court or judge on matters of evidence in *civil* cases. 1. By bill of exceptions founded on the statute West. 2 (13 Edw. I.), c. 31, stat. 1: — "Cum aliquis implacitatus coram aliquibus justiciariis, proponat exceptionem, et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate." But, by the "Rules of the Supreme Court"(*y*), bills of exceptions and proceedings in error are now abolished.

2. The improper admission or rejection of evidence was also a ground for an application to the court in banc for a new trial. And this mode of proceeding was generally adopted in preference to that by bill of exceptions, partly through an absurd notion that the tendering a bill of exceptions was disrespectful to the judge, but principally to avoid expense and delay. But the court would often refuse a new trial, even where an undoubted error had been committed by the judge, if they thought that under all the circumstances justice had been done (*z*); and now, by the "Rules of the Supreme Court" (*a*), a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, and direct a new trial as to the other part only, or as to the other party or parties.

§ 648. 2. As to *criminal* cases. It is said that bills of exceptions do not lie in such cases (*b*), and they are certainly never seen in practice. But the Court of Queen's Bench will grant a new trial

(*u*) Order XXXVI. Rule 34.

(*y*) Order LVIII. Rule 1, of the rules scheduled to the Judicature Act of 1875.

(*z*) *Atkinson* v. *Pocock*, 12 Jur. 60, and the cases there cited; *Wickes* v. *Clutterbuck*, 2 Bingh. 483; *Doe d. Welsh* v. *Langfield*, 16 M. & W. 497; *Bessey* v. *Wyndham*, 6 Q. B. 166.

(*a*) Order XXXIX. Rule 6.

(*b*) Ph. & Am. Ev. 947; 2 Phill. Ev. 541–542, 10th Ed.

in certain cases of misdemeanour (*c*), though not in a case of felony (*d*). Formerly, when the judge before whom a criminal cause was tried, in the Central Criminal Court, or on circuit, entertained a doubt on any point of law or evidence, he reserved the question for the consideration of the judges of the superior courts, who heard it argued, and if they thought the accused improperly convicted, recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict. c. 78, however, this was altered; and a regular tribunal, consisting of at least five judges, was constituted, for the decision of all points reserved on criminal trials by any court of oyer and terminer, or jail delivery, or court of quarter sessions. But neither under the old practice nor under this statute have the parties to a criminal proceeding any *compulsory* means of reviewing the decision of the judge.

(*c*) Archb. Cr. Off. Pract. 96, 97; *R.* v. *Whitehouse*, 1 Dearsl. C. C. 1; *R.* v. *Russell*, 3 E. & B. 942.

(*d*) *R.* v. *Bertrand*, L. Rep., 1 P. C. 520; *R.* v. *Scaife*, 2 Den. C. C. 281, in which a new trial (the question of jurisdiction not being raised) was granted, is clearly not law.

AMERICAN NOTES.

(§ 641) Leading Questions. — (*a*) *Rule.* — No party is permitted, during any direct examination of his witness on controverted points material to the issue, to ask such witness any question which, in the opinion of the judge, suggests, or tends to suggest, the desired answer. People *v.* Mather, 4 Wend. 229, 247; Snyder *v.* Snyder, 6 Binn. 483; Lee *v.* Tinges, 7 Md. 215; Osborn *v.* Forshee, 22 Mich. 209; State *v.* Benner, 64 Me. 267, 279; Stringfellow *v.* State, 26 Miss. 157; De Haven *v.* De Haven, 77 Ind. 236; Trammell *v.* McDade, 29 Tex. 360. If, however, the question is on an immaterial point, or is the natural and obvious method of eliciting the information sought, such question may be asked. Hale *v.* Taylor, 45 N. H. 405; Wilson *v.* McCullough, 23 Pa. St. 440; Adams *v* Harrold, 29 Ind. 198; Hopper *v.* Com., 6 Gratt. 684; Potter *v.* Bissell, 3 Lans. 205. So a witness may be led to the topic with regard to which his evidence is desired, *provided* the information conveyed by the question goes no further. People *v.* Mather, 4 Wend. 229, 247; Long *v.* Steiger, 8 Tex. 460; Cronan *v.* Cotting, 99 Mass. 334, 337; Strawbridge *v.* Spann, 8 Ala. 820, 825; Boothby *v.* Brown, 40 Ia. 104. See also Cheeney *v.* Arnold, 18 Barb. 434. That a simple affirmative or negative answer would be conclusive, is a rough test of a leading question, though by no means the sole or final standard. Starkie, Ev. pp. 166, 167; People *v.* Mather, 4 Wend. 229, 247; Kennedy *v.* State, 19 Tex. App. 618. A question which may be answered by "Yes" or "No" is not leading, unless it is in some manner indicated which is expected or desired. Kemmerer *v.* Edelman, 23 Pa. St. 143; Spear *v.* Richardson, 37 N. H. 23, 31; Floyd *v.* State, 30 Ala. 511; Mathis *v.* Buford, 17 Tex. 152. A question may be leading, though made in the common alternative form, "Whether or not," &c. People *v.* Mather, 4 Wend. 229, 248; Willis *v.* Quimby, 31 N. H. 485, 490. So also answers cannot, it is said, "be put into the mouth of the witness;" no question can be asked which assumes as proven a fact in issue or dispute. Turney *v.* State, 8 Sm. & M. 104; Davis *v.* Cook, 14 Nev. 265, 287; Hewitt *v* Clark, 91 Ill. 605; Balt. &c. R. R. Co *v.* Thompson, 10 Md. 76; People *v.* Graham, 21 Cal. 261; People *v.* Mather, 4 Wend. 229, 248, Page *v.* Parker, 40 N. H.

47, 63. The rule does not apply to the court. Com. *v.* Galavan, 9 All. 271; Epps *v.* State, 19 Ga. 102, 118.

(*b*) *Exceptions.* — (1) After the "general memory" of a witness is exhausted, leading questions may be put, in order to bring the subject upon which his evidence is desired more pointedly to the attention. Huckins *v.* Ins. Co., 31 N. H. 238; Herring *v.* Skaggs, 73 Ala. 446; Cheeney *v.* Arnold, 18 Barb. 434; Moody *v.* Rowell, 17 Pick. 490, 498; Lowe *v.* Lowe, 40 Ia. 220; Donnell *v.* Jones, 13 Ala. 490, 507; Coon *v.* People, 99 Ill. 368. See also Gunter *v.* Watson, 4 Jones (N. C.) L. 455. (2) Where a witness is hostile; and, in general, wherever there exists a right of examination *ex adverso*. State *v.* Benner, 64 Me. 267; Bank No. Liberties *v.* Davis, 6 Watts & Serg. 285; Coker *v.* Hayes, 16 Fla. 368; Bradshaw, Admr. *v.* Combs, 102 Ill. 428; Severance *v.* Carr, 43 N. H. 65. Such questions are at all times within the discretion of the court. Gunter *v.* Watson, 4 Jones (N. C.) L. 455; Wells *v.* Iron Co., 48 N. H. 491, 540; The Charles Morgan, 115 U. S. 69; Hausenfluck's Case, 85 Va. 702; Coker *v.* Hayes, 16 Fla. 368; Donnell *v.* Jones, 13 Ala. 490, 507; Smith *v.* Hutchins, 30 Mo. 380; State *v.* Lull, 37 Me. 246; York *v.* Pease, 2 Gray, 282; Walker *v.* Dunspaugh, 20 N. Y. 170. So a party is permitted to put leading questions to his adversary, if forced to call him as a witness. *In re* Foster, 44 Vt. 570, 574; Brubaker *v.* Taylor, 76 Pa. St. 83.

(§ 644) Examination of Witnesses. — A. Examination of Friendly Witnesses. — B. Examination of Adverse Witnesses. — C. Examination Subsequent to Cross-Examination.

A. Examination of Friendly Witnesses. — *Direct Examination.* — (*a*) *Method.* — By offering a witness, a party is held to recommend him as worthy of credence: he warrants his veracity. See 1 Greenl. Ev. §§ 431–469. For this reason, corroboration by proof of prior consistent statement is not, in general, permitted. Deshon *v.* Merchants' Ins. Co., 11 Metc. 199; Com. *v.* James, 99 Mass. 438. See also Williams *v.* State, 61 Ala. 33. So also it is not, in general, open to the party offering the witness to test his credit, or impeach his truthfulness, whether by evidence of general reputation or by proof of contradictory statements. 11 Am. Law Rev. 261; Com. *v.* Welsh, 4 Gray, 535; Sanchez *v.* People, 22 N. Y. 147, 152; Chamberlain *v.* Sands, 27 Me. 458; Adams *v.* Wheeler, 97 Mass. 67; Pollock *v.* Pollock, 71 N. Y. 137; Brewer *v.* Porch, 17 N. J. L. 377; Stearns *v.* Merchants' Bank, 53 Pa. St. 490; Rockwood *v.* Poundstone, 38 Ill. 199; Quinn *v.* State, 14 Ind. 589; Hunt *v.* Coe, 15 Ia. 197; People *v.* Jacobs, 49 Cal. 384; McDaniel *v.* State, 53 Ga. 253; Young *v.* Wood, 11 B. Monr. 123, 134; Fairly *v.* Fairly, 38 Miss. 280.

(*b*) *Exceptions.* — (1) *Own Case.* — A party may indirectly contradict his witness by proving his case through other witnesses. Perry *v.* Massey, 1 Bail. (S. C.) 32; Shelton *v.* Hampton, 6 Ired. (N. C.) L. 216; Hall *v.* Houghton, 37 Me. 411; Swamscot, &c. Co. *v.* Walker, 22 N. H. 457; Brown *v.* Wood, 19 Mo. 475; People *v.* Safford, 5 Denio, 112, 117; Olmstead *v.* Winsted Bank, 32 Conn. 278; Rockwood *v.* Poundstone, 38 Ill. 199; Clapp Bros. *v.* Peck, 55 Ia. 270; Smith *v.* Ehanert, 43 Wis. 181; Warren *v.* Gabriel, 51 Ala. 235; Brolley *v.* Lapham, 13 Gray, 294; Norwood *v.* Kenfield, 30 Cal. 393. Robinson *v.* Reynolds, 23 Q. B. U. C. 560; Wagener *v.* Mars, 27 S. C. 97. See also People *v.* Skeehan, 49 Barb. 217; Warren *v.* Chapman, 115 Mass. 584.

(2) *Surprise.* — As stated in the text (§ 645, *infra*), the rule forbidding discredit of a party's witnesses apparently proceeds upon the theory that such course would, in the ordinary case, be *mala fides* to the tribunal; it being assumed that the witness must already be discredited to the knowledge of the party who offers him as a witness. Where, however, there is a surprise, the witness unexpectedly turning hostile, the rule has been relaxed, and many of the rights of examination *ex adverso* are given. Moore *v.* Chicago, &c. R. R., 59 Miss. 243; Davidson *v.* Arsineau, 10 New Bruns. 289; Com. *v.* Chaney, 148 Mass. 6; McNerney *v.* Reading, 150 Pa. St. 611; State *v.* Norris, 1 Hayw. (N. C.) 429, 437, 438; Bank No. Liberties *v.* Davis, 6 Watts & Serg. 285. He may be asked whether he has not made previous statements inconsistent with his present evidence. Bullard *v.* Pearsall, 53 N. Y. 230; Humble *v.* Shoemaker, 70 Ia. 223; Gardner *v.* Connelly, 75 Ia. 205; Ward *v.* Young, 42 Ark. 542; Mitchell *v.* Sawyer, 115 Ill. 650; Hemingway *v.* Garth, 51 Ala 530. See also, by statute, Blackburn *v.* Com., 12 Bush (Ky.), 181. But *semble* he cannot be discredited by evidence solely offered to show

direct lack of veracity. Com. *v.* Welsh, 4 Gray, 535; Coulter *v.* American, &c. Exp. Co., 56 N. Y. 585; Stearns *v.* Merchants' Bank, 53 Pa. St. 490; Hildreth *v.* Aldrich, 15 R. I. 163; Cox *v.* Eayres, 55 Vt. 24; People *v.* Jacobs, 49 Cal. 384. The rule has been frequently modified by statute; such direct contradiction of statement being generally allowed. White *v.* State, 10 Tex. Ct. App. 381. See also Force *v.* Martin, 122 Mass. 5; Day *v.* Cooley, 118 Mass. 524; Ryerson *v.* Abington, 102 Mass. 526.

(3) *Necessary Witness.* — The common-law rule forbidding a party to discredit his witness has, it seems, no application when the party has had by legal intendment no choice. Thus an attesting witness may be contradicted or otherwise discredited by the party offering him. Cowden *v.* Reynolds, 12 S. & R. 281; Williams *v.* Walker, 2 Rich. (S. C.) Eq. 291; Whitman *v.* Morey, 63 N. H. 448; Ketchem *v.* Johnson, 3 Green (N. J.), Ch. 370; Duckwall *v.* Weaver, 2 Ohio, 13; Shorey *v.* Hussey, 32 Me. 579; Thornton *v.* Thornton, 39 Vt. 122; Dennett *v.* Dow, 5 Shepl. 19. But see also Whitaker *v.* Salisbury, 15 Pick. 534, 544.

(4) *Adversary.* — So, where it becomes necessary for a party to call his adversary as a witness, he may discredit or cross-examine. Brubaker *v.* Taylor, 76 Pa. St. 83. But see Chandler *v.* Fleeman, 50 Mo. 239; Holbrook *v.* Mix, 1 E. D. Smith, 154; Gabbett *v.* Sparks, 60 Ga. 582; Hunt *v.* Coe, 15 Ia. 197; McDonald *v.* Carson, 94 N. C. 497; Cross *v.* Cross, 108 N. Y. 628; Helms *v.* Green, 105 N. C. 251; Hay *v.* Reid, 85 Mich. 296; Mair *v.* Culy, 10 Q. B. U. C. 321. Can prove his contradictory statements. Hildreth *v.* Aldrich, 15 R. I. 163. The reverse of the proposition is also true. It is within the discretion of the court to refuse the privileges of cross examination to the counsel of a party called as a witness by the other side, or if a witness shows a strong bias for the side desiring to cross examine him. Moody *v.* Rowell, 17 Pick. 490, 498.

(5) "*Own Witness.*" — Such being the rule, it frequently becomes material to ascertain what constitutes such examination of a witness as makes him the witness of the examining party. Usually calling and swearing a witness makes him the witness of the party so calling. Barker *v.* Bell, 46 Ala. 216; Dunbar *v.* Meek, 32 C. P. U. C. 195; but otherwise of a calling without examination, especially in jurisdictions where direct examination determines the scope of cross-examination. Austin *v.* State, 14 Ark. 555; Linsley *v.* Lovely, 26 Vt. 123. See also Lunday *v.* Thomas, 26 Ga. 537. So also of calling for merely formal purposes. Watson *v.* Ins. Co., 2 Wash. C. Ct. 480. But see Beal *v.* Nichols, 2 Gray, 262, *contra*. Or in case of a manifest surprise, Bebee *v.* Tinker, 2 Root, 160. In jurisdictions where cross examination is limited to matters inquired of in direct examination (see B. (*b*), I. of this note, *infra*), examination as to matters not so covered makes the witness that of examining party as to such matters. Phila. &c. R. R. Co. *v.* Stimpson, 14 Pet. 448, 461; Patton *v.* Hamilton, 12 Ind. 256. See also Brown *v.* State, 28 Ga. 199, 212.

(*c*) *Scope of Direct Examination.* — (1) *Veracity of Witnesses.* — It is always within the scope of a direct examination to establish by evidence lack of veracity in an adverse witness. Com. *v.* Billings, 97 Mass. 405. So to sustain an impeached witness. Clark *v.* Bond, 29 Ind. 555; Howser *v.* Com., 51 Pa St. 332. As to whether the maxim, *Falsus in uno, falsus in omnibus*, is prevailing law in this country. See Pawlette *v.* Brown, 40 Mo. 52; Blanchard *v.* Pratt, 37 Ill. 283; Mead *v.* McGraw, 19 Oh. St. 55; Knowles *v.* People, 15 Mich. 408; Callanan *v.* Shaw, 24 Ia. 441; Com. *v.* Billings, 97 Mass. 405. It is said the maxim should be cautiously applied. Hillman *v.* Schwenk, 68 Mich. 293; R. R. *v.* Hedrick, 62 Miss. 28.

(2) *Degree of Certainty.* — It is not required that a witness speak with absolute certainty. Turner *v.* McFee, 61 Ala. 468; Nute *v.* Nute, 41 N. H. 60; Humphreys *v.* Parker, 52 Me. 502. His recollection must, however, be more than a doubt or a surmise. Clark *v.* Bigelow, 4 Shepl. 246; Sanchez *v.* People, 22 N. Y. 147; People *v.* Rogers, 13 Abb. (N. Y.) Prac. N. S. 370. See also Bishop *v.* Spining, 38 Ind. 143; Dexter *v.* Hall, 15 Wall. 9.

B. Examination of Adverse Witnesses. — *Cross-Examination.* — (*a*) *When allowed.* — In general, every witness subjected to a direct examination may be cross-examined, at the option of the adverse party, to test, supplement, or explain his direct evidence. Wilson *v.* Wagar, 26 Mich. 452; Toole *v.* Nichol, 43 Ala. 406; Burghart *v.* Brown, 51 Mo. 600; State *v.* Benner, 64 Me. 267, 279; State *v.* Montgomery, 28 Mo. 594.

If a witness die before his direct examination is cross-examined, such evidence is inadmissible. Kissam *v.* Forrest, 25 Wend. 651. But see Burden *v.* Pratt, 8 Al. Law Jour. 382. The rule authorizing cross-examination does not apply where a witness is sworn, but not examined. Austin *v.* State, 14 Ark. 555. Nor to preliminary examination as to the competency of evidence. Com. *v.* Morrell, 99 Mass. 542.

(*b*) *Its Scope.* — (I.) *As to Matters in Issue or Relevant thereto.* — (II.) *As to Credit of Witnesses.*

(I.) *The Scope of Cross-Examination on the Case.* — Whether the right of cross-examination covers the whole case, or is restricted to matters touched upon in the direct examination, is a point upon which the authorities are in conflict. The weight of American authority is in favor of restricting the right, making it simply co-extensive with the examination in chief. Phila. &c. R. R. Co. *v.* Stimpson, 14 Pet. 448, 461; Houghton *v.* Jones, 1 Wall. 702; Donnelly *v.* State, 26 N. J. L. 463, 494; Johnson *v.* Wiley, 74 Ind. 233; Buckley *v.* Buckley, 14 Nev. 262; Fulton *v.* Bank, 92 Pa. St. 112; Bell *v.* Chambers, 38 Ala. 660; Chicago, &c. R. R. Co. *v.* Coal Co., 36 Ill. 60, 64; Thornton *v.* Hook, 36 Cal. 223; Wilhelmi *v.* Leonard, 13 Ia. 330; Sumner *v.* Blair, 9 Kans. 521; Congar *v.* Galena, &c. R. R., 17 Wis. 477. See also, to substantially the same effect, Detroit, &c. R. R. Co. *v.* Van Steinburg, 17 Mich. 99; Toole *v.* Nichol, 43 Ala. 406, 419; Drohn *v.* Brewer, 77 Ill. 280; Brown *v.* State, 28 Ga. 199; Woodbury *v.* District, 5 Mackey, 127; Hanks *v.* Rhoads, 128 Ill. 404; Krager *v.* Pierce, 73 Ia. 359; Lawder *v.* Henderson, 36 Kans 754; Lamb *v.* Ward, 18 Q. B. U. C. 304. Many American courts, however, maintain the English rule, that direct examination, even for formal proof, opens up the whole case to cross-examination. Moody *v.* Rowell, 17 Pick. 490, 498; Fulton Bank *v.* Stafford, 2 Wend. 483; Linsley *v.* Lovely, 26 Vt. 123; Fralick *v.* Presley, 29 Ala. 457; Com. *v.* Morgan, 107 Mass. 199, 204; Mask *v.* State, 32 Miss. 405, 427; State *v.* Sayers, 58 Mo. 585; Haynes *v.* Ledyard, 33 Mo. 319. Questions on the case must be relevant to the issue. (Conf. § 251, n. 1, *supra.*) The same stringency is, as a rule, not required as in a direct examination. Mayhew *v.* Thayer, 8 Gray, 172. In many particulars the range is discretionary with the court. Norris *v.* Cargill, 57 Wis. 251; Free *v.* Buckingham, 59 N. H. 219; Langley *v.* Wadsworth, 99 N. Y. 61. It has been held that a party who has opened his case to the jury will not be entitled to establish such case by cross-examination, but must recall the witness. Harrison *v.* Rowan, 3 Wash. C. Ct. 580; Morrison *v.* De Lorimier, 16 L. C. Jur. 157; Ellmaker *v.* Bulkley, 16 S. & R. 72, 77. But see Burke *v.* Miller, 7 Cush. 547; Com. *v.* Hudson, 11 Gray, 64.

(II.) *Scope of Cross-Examination as to Credit.* — A witness will be required on cross-examination to answer any question, however disgracing, if, in the discretion of the judge, such question fairly tends to test and characterize the veracity or general credibility of the witness. Neal *v.* Neal, 58 Cal. 287; Wilbur *v.* Flood, 16 Mich. 40; Muller *v.* St. Louis Hosp. Assoc., 73 Mo. 242; Com. *v.* Curtis, 97 Mass. 574. Thus, a witness may be asked whether he has been in prison, and if so, how long. Real *v.* People, 42 N. Y. 270; Wilbur *v.* Flood, 16 Mich. 40; State *v.* O'Brien, 81 Ia. 93; Howser *v.* Com., 51 Pa. St. 332. See also Newcomb *v.* Griswold, 24 N. Y. 298; Com. *v.* Bonner, 97 Mass. 587. Or has ever been indicted for a criminal offence. Clemens *v.* Conrad, 19 Mich. 170. It is, however, within the discretion of the court to refuse to permit questions which tend to disgrace rather than discredit. Wroe *v.* State, 20 Oh. St. 460, 471; State *v.* Garland, 95 N. C. 671; Smith *v.* Castles, 1 Gray, 108; *In re* Lewis, 39 How. (N. Y.) Prac. 155; Harper *v.* Indianapolis, &c. R. R., 47 Mo. 567. A witness cannot be impeached by showing lack of religious belief. People *v.* Copsey, 71 Cal. 548. McCreary *v.* Grundy, 39 Q. B. U. C. 316; Ewing *v.* Bailey, 36 Ill. App. 191; Bush *v.* Com., 80 Ky. 244. See also Coker *v.* Dawkins, 20 Fla. 141, or that he deserted from the army. R. R. *v.* Johnson, 83 Tex. 628.

Contradictory Statements. — So also a witness may be asked whether on a previous occasion he has not made statements inconsistent with his present testimony. Shields *v.* Cunningham, 1 Blackf. 86; Sloan *v.* N. Y. Cent. R. R., 45 N. Y. 125; Keerans *v.* Brown, 68 N. C. 43; Welch *v.* Abbot, 72 Wis. 512; Heddles *v.* R. R., 74 Wis. 239; Peck *v.* Ritchey, 66 Mo. 114. Even in prior suits, Toplitz *v.* Hedden, 146 U. S. 252. *Provided,* (1) that, unless the point covered by such alleged contradiction be one material to the issue, — *i. e.,* be such as to be in itself admissible as part of the case of the interrogating

party, — the answer to such a question cannot be contradicted. U. S. *v.* White, 5 Cranch, C. Ct. 38, 42; Washington *v.* State, 63 Ala. 189; Smith *v.* Royalton, 53 Vt. 604, 609; Beardsley *v.* Wildman, 41 Conn. 515; Shurtleff *v.* Parker, 130 Mass. 293; Henderson *v.* State, 1 Tex. Ct. of App. 432; People *v.* Furtado, 57 Cal. 345; Schlater *v.* Winpenny, 75 Pa. St. 321, 325; State *v.* Crouse, 86 N. C. 617; Combs *v.* Winchester, 39 N. H. 13; State *v.* Staley, 14 Minn. 105; Schell *v.* Plumb, 55 N. Y. 592; State *v.* Kingsbury, 58 Me. 238; Hamilton *v.* Holder, 15 New Bruns. 222; Gilbert *v.* Gooderham, 6 C. P. U. C. 39; Beemer *v.* Kerr, 23 Q. B. U. C. 557; McCulloch *v.* Ins. Co., 34 Q. B. U. C. 384; Alexander *v.* Kaiser, 149 Mass. 321; Lewis *v.* Barker, 55 Vt. 21; State *v.* Hawn, 107 N. C. 810; Johnson *v.* State, 22 Tex. App. 206; Jones *v.* State, 67 Miss. 111; Franklin *v.* Franklin, 90 Tenn. 44; Com. *v.* Hourigan, 89 Ky. 305; People *v.* Dye, 75 Cal. 108; Livingston *v.* Roberts, 18 Fla. 70; State *v.* Goodwin, 32 W. Va. 177. That the usual test of a collateral question is whether the cross examining party could prove the fact as part of his case, see Hildeburn *v.* Curran, 65 Pa. St. 59. And (2) *provided further*, that the circumstances of such alleged prior statements be first placed before the witness with sufficient clearness to identify the occasion referred to. McKinney *v.* Neil, 1 McLean, 540; Gaffney *v.* People, 50 N. Y. 416, 423; Conrad *v.* Griffey, 16 How. (U. S.) 38, 46; Unis *v.* Charlton's Admr., 12 Gratt. 484; Matthis *v.* State, 33 Ga. 24; People *v.* Devine, 44 Cal. 452; State *v.* Kinley, 43 Ia. 294; Richardson *v.* Kelly, 85 Ill. 491; Brubaker *v.* Taylor, 76 Pa. St. 83; State *v.* Angelo, 32 La. An. 407; State *v.* Glynn, 51 Vt. 577; State *v.* Staley, 14 Minn. 105; Hill *v.* Gust, 55 Ind. 45; Spaunhorst *v.* Link, 46 Mo. 197; Ayres *v.* Duprey, 27 Tex. 593; Bradford *v.* Barclay, 39 Ala. 33; Higgins *v.* Carlton, 28 Md. 115. See also Leonard *v.* Kingsley, 50 Cal. 628; R. *v.* Mailloux, 16 New Bruns. 493; Decary *v.* Poirier, 20 L. C. J. 167; Sequin *v.* Rochon, 11 L. N. 386; McCamant *v.* Roberts, 80 Tex. 316; Jones *v.* State, 65 Miss. 179; McCulloch *v.* Dobson, 133 N. Y. 114; Frazier *v.* State, 42 Ark. 70; Young *v.* Brady, 94 Cal. 128; R. R. *v.* Artery, 137 U. S. 507; Hunter *v.* Gibbs, 79 Wis. 70. If the inconsistent statements are in writing, the rules relating to proof of written documents apply. 1 Greenl. Ev. §§ 463, 464, 465. Cannot show inconsistent statements after the decease of the witness. Ayers *v.* Watson, 132 U. S. 394. See also, Craft *v.* Com., 81 Ky. 250. If the witness denies such prior statements, they may be proved to discredit him. But it has been held that if the prior statement was made on another trial, it is not sufficient to recollect the substance of the evidence. Fraser *v.* Black, 7 New Bruns. 312. But see, *contra*, U. S. *v.* White, 5 Cranch, C. Ct. 457; Com. *v.* Hawkins, 3 Gray, 463; Hedge *v.* Clapp, 22 Conn. 622; Robinson *v.* Hutchinson, 31 Vt. 443; Cook *v.* Brown, 34 N. H. 460; New Portland *v.* Kingfield, 55 Me. 172, 177. The witness may be contradicted, though he does not deny such prior statements, but simply fails to recollect them. Nute *v.* Nute, 41 N. H. 60; Ray *v.* Bell, 24 Ill. 444; Gregg *v.* Jamison, 55 Pa. St. 468. See also Com. *v.* Bean, 111 Mass. 438. The rule may be modified in the discretion of the court. Walden *v.* Finch, 70 Pa. St. 460. In this connection, the veracity and bias of a witness are deemed relevant to the issue, and the answer of the witness directly involving these considerations may be contradicted. People *v.* Austin, 1 Parker, C. R. 154; Day *v.* Stickney, 14 All. 255; Davis *v.* Roby, 64 Me. 427; Martin *v.* Farnham, 25 N. H. 195; Morgan *v.* Frees, 1 Am. Law Reg. 92; Swift Co. *v.* Grant, 90 Mich. 469; Kent *v.* State, 42 Oh. St. 426; Beardsley *v.* Wildman, 41 Conn. 515; Bullard *v.* Lambert, 40 Ala. 204; Geary *v.* People 22 Mich. 220; Ordway *v.* Haynes, 50 N. H. 159, 165; Hutchinson *v.* Wheeler, 35 Vt. 330, 340; Swett *v.* Shumway, 102 Mass. 365. See also Lucas *v.* Flinn, 35 Ia. 9, 14; Smith *v.* Met. R. R., 137 Mass. 61. In general, no witness can be asked, on cross-examination, any question not relevant to the issue simply with a view to discredit him by other evidence establishing the falsity of his answer. Wau-Kon-Chaw-Neek-Kaw *v.* U. S., 1 Morris (Ia.), 332, 337; Marx *v.* People, 63 Barb. 618; State *v.* Benner, 64 Me. 267, 287; Fletcher *v.* Boston, &c. R. R., 1 All. 9; Johnson *v.* Wiley, 74 Ind. 233; Lawrence *v.* Barker, 5 Wend. 301; Radford *v.* Jesse, 2 Dev. & Bat. 39; Jones *v.* M'Neil, 2 Bailey (S. C.), 466; Seavy *v.* Dearborn, 19 N. H. 351, 356; Cornelius *v.* Com., 15 B. Monr. (Ky.) 539; Rosenbaum *v.* State, 33 Ala. 354. The whole matter is largely in the discretion of the court. Prescott *v.* Ward, 10 All. 203, 209; Comstock *v.* Smith, 20 Mich. 338; Ellsworth *v.* Potter, 41 Vt. 685; Wroe *v.* State, 20 Oh. St. 460.

For a statement of the rules concerning incriminating, as distinguished from disgracing, questions, conf. § 578, n. 1 (*d*), *supra*.

C. Examination Subsequent to Cross-Examination. — (*a*) *Redirect Examination.* — *Its Scope.* — Redirect examination is confined to explanation and rebuttal. It is limited to the precise matters upon which the witness has been cross-examined. Its scope, therefore, varies with that of the cross-examination, of which it is a supplementing incident. Dutton *v.* Woodman, 9 Cush. 255; Schlenker *v.* State, 9 Brown (Neb.), 241; Carr *v.* Moore, 41 N. H. 131; Jaspers *v.* Lano, 17 Minn. 296, 305; Baxter *v.* Abbott, 7 Gray, 71, 82; Somerville, &c. R. R. *v.* Doughty, 22 N. J. L. 495. Re-examination as to new matter is in the discretion of the court. Brown *v.* Burrus, 8 Mo. 26, 29; Wickenkamp *v.* Wickenkamp, 77 Ill. 92; Hemmens *v.* Bentley, 32 Mich. 89; Schlenker *v.* State, 9 Brown (Neb.), 241. Rebutting evidence may, in the discretion of the court, set up a new case. Devlin *v.* Crocker, 7 U. C. Q. B. 398.

Re-examination and Rebuttal as to Credit. — So where cross-examination has tended to the manifest discredit of a witness, general evidence of good moral character is admissible on re-examination or in rebuttal. Hadjo *v.* Gooden, 13 Ala. 718; Isler *v.* Dewey, 71 N. C. 14; Wertz *v.* May, 21 Pa. St. 274. But see Harrington *v.* Lincoln, 4 Gray, 563. So evidence of good character may be offered in rebuttal of evidence discrediting a witness. Sweet *v.* Sherman, 21 Vt. 23; Hadjo *v.* Gooden, 13 Ala. 718. But see Stamper *v.* Griffin, 12 Ga. 450, *contra.*

Corroborating Statements. — Where evidence has been offered tending to show bias, improper motive, or recent fabrication on the part of a witness, calculated to account for the testimony given, prior similar statements made before such bias or motive could have actuated the witness may be given on redirect examination, or in rebuttal. People *v.* Doyell, 48 Cal. 85; Thompson *v.* State, 38 Ind. 39; State *v.* Whelehon, 102 Mo. 17; Graham *v.* McReynolds, 90 Tenn. 673; U. S. *v.* Neverson, 1 Mackie, 152; Robb *v.* Hackley, 23 Wend. 50; Hayes *v.* Cheatham, 6 Lea (Tenn.), 1, 10; Stolp *v.* Blair, 68 Ill. 541. See also Henderson *v.* Jones, 10 S. & R. 322; State *v.* George, 8 Ired. (N. C.) L. 324; Dossett *v.* Miller, 3 Sneed, 72. In general, however, prior consistent statements cannot be introduced. Craig *v.* Craig, 5 Rawle, 91; U. S. *v.* Holmes 1 Cliff. 98, 105; Boyd *v.* First Nat. Bank of Oskaloosa, 25 Ia. 255; Mason *v.* Vestal, 88 Cal. 396; Crooks *v.* Bunn, 136 Pa. St. 368; Butler *v.* Truslow, 55 Barb. 293; Head *v.* State, 44 Miss. 731, 751; Nichols *v.* Stewart, 20 Ala. 358; Sidelinger *v.* Bucklin, 64 Me. 371; Gibbs *v.* Linsley, 13 Vt. 208; Stolp *v.* Blair, 68 Ill. 541; People *v.* Doyell, 48 Cal. 85; Com. *v.* Jenkins, 10 Gray, 485. See also Judd *v.* Brentwood, 46 N. H. 430; Roberts *v.* Roberts, 82 N. C. 29; Hooks *v.* Houston, 109 N. C. 623; Maitland *v.* Citizens' &c. Bank, 40 Md. 540, 559; Carter *v.* Carter, 79 Ind. 466; State *v.* Hatfield, 72 Mo. 518. See also Conrad *v.* Griffey, 11 How. (U. S.) 480.

(*b*) *Re-cross-examination* stands in the same relation to the redirect that cross-examination does to examination in chief. Wood *v.* McGuire, 17 Ga. 303, 318. See also to the effect that re-cross-examination lies largely within the discretion of the court. Thornton *v.* Thornton, 39 Vt. 122; Com. *v.* Nickerson, 5 All. 518; State *v.* Hoppiss, 5 Ired. (N. C.) L. 406; Coker *v.* Hayes, 16 Fla. 368, 377. And so of subsequent examinations of a witness, which are granted or refused in the discretion of the court. People *v.* Keith, 50 Cal. 137; Koenig *v.* Bauer, 57 Pa. St. 168; Wilkes *v.* Heaton, 17 Q. B. U. C. 95; St. Dennis *v.* Grenier, 2 L. C. Jur. 93; Joseph *v.* Morrow, 4 L. C. Jur. 238; Jackson *v.* Filteau, 15 L. C. R. 60. A witness is always permitted to correct a statement. State *v.* Mays, 24 S. C. 190.

PART II.

ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

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§ 649. In the preceding Part, the main object of this work was brought to a close. The final one, at which we have now arrived, will be devoted, not to law or practice, but to elementary rules for the guidance of advocates in dealing with witnesses. Much of what follows will doubtless appear very obvious to readers experienced in such affairs, but it is not for them that this Part is intended (*a*).

(*a*) This Part being designed solely for those whose forensic experience has either not commenced, or is very limited, we may perhaps be excused for inserting the following judicious advice given to young advocates by some eminent foreign writers: "A young man ought to present himself with an honest assurance, and plead with firmness, but with modesty in his language and demeanour. He should avoid the affectation of fetching things from too far, and should not wander from his subject. If he demands a favourable hearing, let him do it with dignity, and not in a rampant tone. He ought neither exalt himself too much, nor humble himself too much, and the less he can manage to talk about himself the better. If either the manner or matter of his discourse affords room for criticism, he should bear it patiently. The best works are subject to that; and a young man, especially, must not flatter himself with being all at once above paying this tribute, from which even those who have grown old in the career are not exempt." Histoire Abrégée de l'Ordre des Avocats, par M. Boucher d'Argis, ch. 11. The reader will find this in M. Dupin's work, entitled "Profession d'Avocat, — Recueil de Pièces contenant l'Exercice de cette Profession." A good warning is likewise to be found in the following: "Alii memoriæ auditorum consulturi, solis inhærebant conclusionibus, easque modo per causarum genera, quæ vocant, modo per quæstiones disponebant: modo se præclare suo functos officio existimabant, si ad singulos titulos aliquot casuum leviter enucleatorum centurias

§ 650. There is a very prevalent notion that all discussion or comment on this subject is necessarily useless, if not worse. This seems to have arisen partly from a superficial view of the matter, and partly from misapprehension of a passage in Quintilian, in which he is supposed to intimate his opinion that the faculty of interrogating witnesses with effect must be the result either of natural acuteness, or of practice. If the Roman critic meant, what he certainly does not express, — his language being "Naturali magis acumine, aut usu contingit hæc virtus," — that *no* rules can be laid down for the guidance of advocates in this respect, he was most inconsistent with himself; for in the very chapter from which the above passage is taken (*b*), he gives a series of rules for that purpose, which have been admired in every age, and are recommended by high authorities in our own law (*c*). The present chapter is in truth chiefly founded on them, as the constant references will show. It would indeed be strange if, while perfection in all other arts and sciences is attained by the combination of study and experience, the faculty of examining witnesses with effect — which depends so much on knowledge of human nature, and acquaintance with the resources of falsehood and evasion, and is coeval with judicature itself — should be destitute of all fixed principles.

§ 651. The terms "examination in chief" and "cross-examination" are commonly applied, respectively, to the interrogation of witnesses by the party who presents them to the tribunal and by his adversary; the legal rules of practice governing both being, as has been shown in the preceding Part (*d*), mainly based on the principle that every witness produced ought, in the first instance at least, to be presumed favourably disposed towards the party by whom he is called. The very opposite is, however, often the fact; and, accordingly, in what follows the term "cross-examination" will be used in the sense of "examination ex adverso" (*e*); *i. e.*, the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

proponerent. . . . Illi ad memoriam omnia referebant, et si qui jejuna ista præcepta edidicerant, et ad singulas quæstiones ipsa compendii verba poterant reddere, eos aliquot casuum et quæstiuncularum myriadibus suffarcinatos, et phaleris ornatos doctoralibus, ablegabant in forum, strepitum his armis non sine horrore judicis daturos." Heineccius, ad Inst. Præf. p. ix.

(*b*) Quintil. Inst. Orat. lib. 5, cap. 7, De Testibus. Quintilian refers to the dialogues of the Socratic philosophers, and especially those of Plato, as affording good studies in the art of cross examination. Among Plato's Divine Dialogues, see in particular the Protagoras, Second Alcibiades, Theages and Eutyphron.

(*c*) 3 Blackst. Comm. 374; Ph. & Am Ev. 908; 1 Greenl. Ev. § 446, n. (1), 7th Ed.

(*d*) *Supra*, pt. 1, ch. 2, §§ 641, 642.

(*e*) 1 Benth. Jud. Ev. § 496 and 500.

§ 652. In the former of these cases — *i. e.*, the interrogation of witnesses favourable to the cause of the advocate by whom they are interrogated — the following advice is given by Quintilian, in the part of his work to which reference has been made: "Si habet testem cupidum lædendi, cavere debet hoc ipsum, ne cupiditas ejus appareat; nec statim de eo quod in judicium venit rogare, sed aliquo circuitu ad id pervenire, ut illi, quod maximè dicere voluit, videatur expressum; nec nimiùm instare interrogationi, ne ad omnia respondendo testis fidem suam minuat; sed in tantum evocare eum, quantum sumere ex uno satis sit" (*f*). So, when the disposition of the witness towards his cause is unknown to the advocate: "Si nesciet actor quid propositi testis attulerit: paulatim, et (ut dicitur) pedetentim interrogando experietur animum ejus, et ad id responsum quod eliciendum erit, per gradus ducet. Sed, quia nonnunquam sunt hæ quoque testium artes, ut primò ad voluntatem respondeant, quo majore fide diversa posteà dicant, est oratoris, suspectum testem dum prodest, dimittere" (*g*). In another part of the same chapter he adds: "Illæ verò pessimæ artes, testem subornatum in subsellia adversarii mittere, ut inde excitatus plus noceat, vel dicendo contra reum, cum quo sederit; vel quùm adjuvisse testimonio videbitur, faciendo ex industriâ multa immodestè atque intemperanter, per quæ non à se tantùm dictis detrahat fidem, sed cæteris quoque, qui profuerant, auferat auctoritatem: quorum mentionem habui, non ut fierent, sed ut vitarentur."

§ 653. On the subject of "cross-examination," or "examination ex adverso," the following celebrated passages of the same author should be attentively studied (*h*): "In eo qui verum invitus dicturus est, prima felicitas interrogantis est extorquere quod is noluerit. Hoc non alio modo fieri potest, quàm longiùs interrogatione repetitâ. Respondebit enim quæ nocere causæ non arbitrabitur: ex pluribus deinde quæ confessus erit, eò perducetur, ut, quod dicere non vult, negare non possit. Nam, ut in oratione sparsa plerumque colligimus argumenta, quæ per se nihil reum aggravare videantur, congregatione deinde eorum factum convincimus; ita hujusmodi testis multa de anteactis, multa de insecutis, loco, tempore, personâ, cæterisque est interrogandus, ut in aliquod responsum incidat, post quod illi vel fateri quæ volumus, necesse sit, vel iis quæ jam dixerit repugnare. Id si non contingit, reliquum erit, ut eum nolle dicere manifestum sit: protrahendusque, ut in aliquo quod vel extra causam sit, deprehendatur: tenendus etiam diutius, ut omnia, ac plura quàm res desiderat, pro reo dicendo, suspectus judici fiat; quo non minùs nocebit, quàm si vera in reum dixisset." . . . "Primum est, nosse testem. Nam, timidus

(*f*) Quint. *in cap. cit.*
(*g*) *Id.*
(*h*) *Id.*

terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest: prudens verò et constans, vel tanquam inimicus et pervicax dimittendus statim; vel non interrogatione, sed brevi interlocutione patroni refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non asperè incessere profuit; nam sæpe, qui adversùs insectantem pugnassent, modestiâ mitigantur. Omnis autem interrogatio aut in causâ est, aut extra causam. In causâ, patronus altiùs, et unde nihil suspecti sit, repetita percontatione, priora sequentibus applicando, sæpe eò perducit homines, ut invitis quod prosit extorqueat. . . . Illud fortuna interdum præstat, ut aliquid quod inter se parum consentiat, à teste dicatur: interdum (quod sæpius evenit), ut testis testi diversa dicat: acuta autem interrogatio, ad hoc quod casu fieri solet, etiam ratione perducet. Extra causum, quoque, multa quæ prosint, rogari solent; de vitâ testium aliorum, de suâ quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo; in quibus aut dicant aliquid quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis interrogatio debet esse circumspecta, quia multa contra patronos venustè testis sæpe respondet, eique præcipuè vulgò favetur. Tum verbis quàm maximè ex medio sumptis, ut, qui rogatur (is autem sæpius imperitus), intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est."

§ 654. In dealing with examination ex adverso, we propose to consider separately the cases: 1.° Where the evidence of the witness is false in toto. 2.° Where a portion of it is true, but a false colouring is given by the witness to the whole transaction to which he deposes, — either by the suppression of some facts, or the addition of others, or both. 1. Of the former of these the most obvious, though not the most usual case, is where the answers extracted show that the fact deposed to is physically impossible.

§ 655. 2. Cases like the above are, however, necessarily uncommon; in most instances the exertions of the advocate must be directed to showing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnesses were examined out of the hearing of each other; on being asked under what sort of tree the criminal act was done, the first said "a mastick tree," the other "a holm tree." The judgment of Lord Stowell also in *Evans* v. *Evans* (*i*) shows how a supposed transaction may be disproved by its inconsistency with surrounding circum-

(*i*) 1 Hagg. C. R. 105.

stances. "What had you for supper?" says a modern jurist (*k*). "To the merits of the cause, the contents of the supper were in themselves altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare, the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there." The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skilfully cross-examined out of the hearing of each other, especially as courts and juries are aware that a false alibi is a favourite defence with guilty persons, and consequently listen with suspicion even to a true one.

§ 656. 2.° Falsehood in toto is far less common than misrepresentation. 1. Under this head comes exaggeration, the dangers of which have been pointed out in the Introduction (*l*). There are, however, other forms (*m*). *E. g.*, "Question, — About what thickness was the stick with which you saw Reus strike his wife Defuncta? Answer, — About the thickness of a man's little finger. In truth, it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in *quantity*. Question, — With what food did the jailor Reus feed the prisoner Defunctus? Answer, — With sea biscuit, in an ordinary eatable state. In truth, the biscuit was rotten and mouldy in great part. Falsehood in this shape may be termed falsehood in *quality*."

§ 657. 2. Evasion. Of the various resorts of evasion, the most obvious and ordinary are *generality* and *indistinctness*. "Dolosus versatur in generalibus" (*n*). "Dolosus versatur in universalibus" (*o*). "Multiplex indistinctum parit confusionem" (*p*). Untruthful witnesses, as well as unreflecting persons, commonly use words expressing complex ideas, and entangle facts with their own conclusions and inferences. *E. g.*, Question, — What did A. B. (*i. e.*, the plaintiff, defendant, &c., as the case may be) do, or say? Answer, — "He promised," "He engaged," "He authorised," "He ratified," "He confessed," "He admitted," "It was understood," &c., &c., &c. The mode of detection here is to elicit by repeated questions what actually did take place, thus breaking up the complex idea into its component parts, and separating the facts from the inferences. 2. Another form is that of "equivocation," or *verbal* truth-telling, — a practice much resorted to by witnesses who are regardless of their oaths; as also by

(*k*) 2 Benth. Jud. Ev. 9.
(*l*) Pt. 1, § 26.
(*m*) 1 Benth. Jud. Ev. 141.
(*n*) 2 Co. 34 a; 3 Co. 81 a; Wing. M. 636.
(*o*) 2 Bulst. 226; 1 Rol. 157.
(*p*) Hob. 335. See 2 Benth. Jud. Ev. 147.

others who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. "Perjuri sunt qui, servatis verbis juramenti, decipiunt aures eorum qui accipiunt" (*q*). Of this form the commonest is the answer "I might have done" to the direct question "Did you"? — an answer tantamount to an admission.

§ 658. The maxim "Falsus in uno, falsus in omnibus" (*r*), may be pushed too far. It must not be supposed that all the untrue testimony given in courts of justice proceeds from an intention to misstate or deceive. On the contrary, it most usually arises from interest or bias in favour of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their consciences: they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound, and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then showing the falsehood of the direct testimony by comparing it with the facts elicited.

§ 659. Although in enumerating the means by which adverse witnesses are to be encountered, Quintilian puts first (*s*), "timidus (testis) terreri potest," still, menacing language and austerity of demeanour are not the most efficacious weapons for this purpose. For although there are cases in which they may be employed with advantage, still in the vast majority of instances a mendacious, an untruthful, or an evasive witness is far more effectually dealt with, by keeping him in good-humour with himself, and putting him off his guard with respect to the designs of his interrogator. The terror of which Quintilian here speaks, must be understood with reference to a feeling of uneasiness occasioned by remorse of conscience, a sense of shame, a dread of disgrace and punishment, and a sort of undefined apprehension resulting from them all. The witness who is giving false testimony rarely knows what means the interrogator possesses of detecting and exposing him, far less those which may start up at any moment from the auditory at the trial (*t*). But the hardened villain who comes into the witness-box prepared to swear

(*q*) 3 Inst. 166.
(*r*) Broom's Max. xxviii. 4th Ed.
(*s*) *Suprà*, § 653.
(*t*) See bk. 1, pt. 1, § 100.

to unmixed falsehood, and who perseveres in that intention despite every obstacle and every warning, is comparatively rare. On most minds the sanctions of truth (*u*) are in continual, though it may be silent, operation ; and the iniquitous design of a witness to mislead or deceive a tribunal has frequently yielded to the force of these when judiciously displayed to his mental vision. Here, and indeed in examinations ex adverso in general, the great art is to conceal especially from the witness the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters, in order, by diverting his attention, to cause him to forget the answer which it is desired to make him contradict. In a case of murder, to which the defence of insanity was set up, a medical witness, called on the part of the accused, swore that, in his judgment, the accused at the time he killed the deceased was affected with a homicidal mania, and urged to the act by an *irresistible* impulse. The judge, dissatisfied with this, first put to the witness some questions on other subjects, and then asked him, "Do you think the accused would have acted as he did, if a policeman had been present?" to which the witness at once answered in the negative ; on which the judge remarked, "Your definition of irresistible impulse then must be an impulse irresistible at all times except when a policeman is present."

§ 660. But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. The young advocate should reflect that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth (*x*) that he is almost sure to recollect every *material* circumstance by which it was accompanied ; and the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses, of *immaterial* circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavourable, will be conclusive against him ; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question

(*u*) See Introd. pt. 1, §§ 16–20, and pt. 2, §§ 55–59.

(*x*) Introd. pt. 1, § 16.

him as to surrounding or even remote matters; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked; especially where a favourable answer would be very advantageous, and things already press so hard against the cause of the cross-examinating advocate, that it could scarcely be injured by an unfavourable one.

§ 661. The words "longus (testis) protrahi (potest)" (*y*) are omitted in some copies of Quintilian, but are retained in the best editions, and have every appearance of genuineness. Their meaning is, that a witness who, either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall into some contradiction, or let drop something that may be serviceable to the party interrogating. "Of this damning kind," observes the author of a judicious pamphlet (*z*), "are witnesses who prove *too much*; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort: he leads the witness on from one extravagant assertion in his friend's behalf to another; and instead of desiring him to mitigate, presses him to aggravate, his partiality; till at last he leaves him in the mire of some monstrous contradiction to the common-sense and experience of the court and jury; and this the advocate knows will deprive his whole testimony of credit in their minds."

§ 662. The course of cross-examination to be pursued in each particular cause should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which forensic battles have so often been compared, lay down as a principle that every campaign should be conducted with some definite object in view; or, as they express it, that no army should be without its line of operation. There is, however, this difference, that

(*y*) *Suprà*, § 653.

(*z*) Hints to Witnesses in Courts of Justice, by a Barrister (Baron Field). London. 1815. We cite from the Law Mag. vol. 25, p. 361. When corporal punishment in the army excited so much interest some time since, — one party denouncing it as useless cruelty, and the other insisting on it as indispensable to the government of an army, — the author met an officer who warmly defended the practice, and having first taken care to ascertain that none of his hearers had witnessed a military flogging, assured them with great earnestness that there was nothing in it: he had seen a soldier receive *nine hundred and fifty* lashes, and not mind it in the least. It never occurred to this zealous person that if that were true, the usual punishments of 50, 100, or 350 lashes could not be a very effective means of enforcing military discipline.

the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial frequently disclose grounds of attack or defence imperceptible at its outset; the seizing on which, and adapting them to the actual state of things, requires that "ingenio veloci ac mobili, animo præsenti et acri," which Quintilian in another place pronounces so essential to an advocate (*a*). But the analogy is very close in one respect. The advocate, like the general, should always consider whether he is the attacking or defending party, and beware of undertaking the offensive, or of assuming the burden of proof, unless he is strong enough to do so. The violation of this principle is a very common, because very natural, fault in the defence of criminal cases. Oftentimes the only chance of escape is that the proof against the accused may fall short, and all the energies of his advocate should be directed to show that it does. But if, abandoning this defensive attitude, he assumes the offensive, — talks of the accused as an innocent man whom it is sought to oppress; denounces the prosecution as founded in spite, and the evidence by which it is supported as based on perjury; and fails, as without evidence or facts he must fail, in convincing the tribunal of this, — the condemnation of his client follows as matter of course.

§ 663. The faculty of interrogating witnesses with effect is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience.[1] Cross-examination, or examination ex adverso, is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it; and few pleasures exceed that afforded by witnessing its successful application in the detection of guilt or the vindication of innocence. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter-of-fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form. Having in the present chapter endeavoured to illustrate this important subject, we cannot dismiss it without a caution. Maxims of every kind should be to us as guides, — to shorten, as has been well observed, the turnings and windings of experience, — not as stern masters to stifle the inspirations of genius; and the greatest advocate is he who, perfectly conversant with the established rules of his art, knows when to break them alike with safety and advantage.

(*a*) Quintil. Inst. Orat. lib. 6, c. 4.

[1] An interesting statement by an American authority is given at p 614

AMERICAN NOTES.

(§ 663) Brown's Rules for Witnesses. — It is usual to refer in this connection to David Paul Brown's "Golden Rules for the Examination of Witnesses": —

"First, as to *your own witnesses*: — I. If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them which may be calculated to repress their assurance. II. If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue; as, for instance, — Where do you live? Do you know the parties? How long have you known them? &c. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches, lest you may again trouble the fountain from which you are to drink. III. If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel. IV. If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter; unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You cannot impeach him; you cannot cross-examine him; you cannot disarm him; you cannot indirectly even assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purposes of explanation, you must bear in mind that, instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this by all means. V. Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination, — take from your opponent the same privilege it thus gives to you, — and, in addition thereto, not only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony. VI. Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelative. VII. Be careful not to put your question in such a shape that, if opposed for informality, you cannot sustain it, or, at all events, produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result. VIII. Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good. IX. Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest; and make him also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep? X. Modulate your voice as circumstances may direct, — 'Inspire the fearful and repress the bold.' XI. Never begin before you are ready; and always finish when you have done. In other words, do not question for question's sake, but for an answer.

"*Cross-examination*: — I. Except in indifferent matters, never take your eye from that of the witness. This is a channel of communication from mind to mind, the loss of which nothing can compensate: —

'Truth, falsehood, hatred, anger, scorn, despair,
And all the passions, — all the soul is there.'

II. Be not regardless, either, of the voice of the witness. Next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime — the mental reservation of the witness — is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time, the question is asked, Were you at the corner of Sixth and Chestnut Streets, at six o'clock? A frank witness would answer, perhaps, I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers, No; although he may have been within a stone's throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be, I was not at the *corner*, at *six o'clock*. Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise, with a skilful examiner, to the question, At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten, it will appear that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations; but be watchful, I say, of the voice, and the principle may be easily applied. III. Be mild with the mild; shrewd with the crafty; confiding with the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that you may shine, but that virtue may triumph, and your cause may prosper. IV. In a criminal, especially in a capital case, so long as your cause stands well, ask but few questions; and be certain never to ask any the answer to which, if against you, may destroy your client, unless you know the witness perfectly well, and know that his answer will be favorable equally well; or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations. V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses, an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth; or if by cunning, it is the cunning of the witness, and not of the counsel. VI. If the witness determine to be witty or refractory with you, you had better settle that account with him at first, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken your power or his own. But, in any result, be careful that you do not lose your temper: anger is always either the precursor or evidence of assured defeat in every intellectual conflict. VII. Like a skilful chess-player, in every move fix your mind upon the combinations and relations of the game; partial and temporary success may otherwise end in total and remediless defeat. VIII. Never undervalue your adversary, but stand steadily upon your guard: a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes renders effective, the blunders of another. IX. Be respectful to the court and to the jury, kind to your colleague, civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either."

BOOK V.

COLLECTION OF LEADING PROPOSITIONS.[1]

Witnesses.

1. All persons are compellable to give evidence as witnesses who are competent to give it. (See p. 121, *ante*.)

2. The only causes of incompetency to be a witness (except as mentioned in the next paragraph) are deficiency or immaturity of intellect, and refusal to take an oath or affirm. (See p. 130, *ante*.)

3. In criminal proceedings the defendant, if not defended by counsel (*a*), may make any statement he pleases; but neither the defendant nor the husband or wife of the defendant can be examined upon oath, or compelled to give evidence.

The above rule is subject to a large number of exceptions, of which the more important are those contained in the 20th section of the Criminal Law Amendment, 1885, by virtue of which enactment a person accused of rape, abduction, indecent assault, and many other crimes of a like nature is competent but not compellable to give evidence (*b*).

4. A witness, in civil proceedings, is entitled to his expenses before giving evidence. (*Newton* v. *Harland*, 1 M. & G. 956.) In criminal proceedings he is not so entitled, but the court has, in most cases, power to award him reasonable compensation, whether he give evidence for the prosecution (7 Geo. 4, c. 64, ss. 22, 23) or the defence (30 & 31 Vict. c. 35, s. 5).

5. A witness may refuse to answer questions which in the opinion of the court may tend to criminate him for the future; but he may be questioned as to a conviction for past crime, and the conviction may be proved against him if he denies it or refuses to answer. (*Osborn* v. *London Dock Co.*, 10 Ex. 698, and p. 124, *ante*; C. L. P. Act, 1854, s. 25.)

(*a*) *Ante*, p. 570.

(*b*) See bk. iii. ch. xi.

[1] The present editor is responsible for the whole of this "Fifth Book."

6. A party may contradict his own witness, if he prove hostile, by other evidence, or proof of an inconsistent statement. (C. L. P. Act, 1854, s. 22.)

7. If it be intended to contradict an adverse witness by proof of prior statements by him, his attention must first be called to the circumstances under which such statements were made, or to such parts of a writing which are to be used to contradict him. (C. L. P. Act, 1854, ss. 23, 24.)

8. Jurors may in no case disclose what passed amongst them as such; a legal adviser may not disclose the communications of his client without his client's leave; and husband and wife are not compellable to disclose communications to each other during marriage. (See p. 519, *ante*.)

9. On the application of either party the judge has a discretion to order all witnesses, except the parties, their solicitors, and the witness under examination, to be out of court.

10. No action lies against a witness in respect of his evidence. (*Seaman* v. *Netherclift*, 2 C. P. D. 53.)

Plurality of Witnesses.

11. Except as in the next four paragraphs mentioned, the testimony of one witness is sufficient in law, the weakness of such testimony being merely a matter to be considered as a fact.

12. Two witnesses at the least are required to prove perjury or treason. (See p. 552, *ante*.)

13. Two witnesses are required for the attestation of a will. (Wills Act, s. 9, p. 223, *ante*.)

14. A man may not be convicted of perjury except on the evidence of two witnesses, or the corroborated evidence of one. (*R.* v. *Shaw*, 10 Cox, C. C. 66.)

15. A man may not be adjudged the father of an illegitimate child (*h*), and judgment may not be given for the plaintiff in an action for breach of promise of marriage (*i*), unless the evidence of the mother or the plaintiff be corroborated in some material particular.

16. The unsupported evidence of an accomplice is legally admissible, but it is usual for a judge to tell a jury that they ought not to believe it. (See p. 174, *ante*.)

(*h*) Bastardy Act, 1872, s. 4.

(*i*) 32 & 33 Vict. c. 68, s. 2.

Documents.

17. The construction of a document is to be decided by the judge. (See p. 218, *ante.*)

18. No action can be brought on a promise of an executor to be personally liable; a promise of any person to answer for the present or future debt of another; a promise in consideration of marriage; a contract to let or sell land; or a contract not to be performed within one year from the making thereof; unless the contract or some memorandum thereof be in writing, signed by the party to be charged or his authorised agent.

19. No action can be brought on a contract for the sale of goods for 10*l.* or more, unless the buyer accept part of the goods or make some payment, or the contract or some memorandum thereof be in writing, signed by the party to be charged or his authorised agent. (Stat. of Frauds, ss. 4, 17.)

20. Writing is required to prove the sale of a ship, or of a copyright, and the execution of a will. (See p. 48, *ante.*)

21. Oral evidence is inadmissible to contradict, vary, or explain written documents, except to explain ambiguities not appearing on the face of the documents themselves, to impeach the documents for duress or fraud, to show usage, or to establish a collateral contract. (See p. 228, *ante.*)

22. Interlineations or alterations in a material part, but in no other part, vitiate a document. (*Aldous* v. *Cornwall*, L. R., 3 Q. B. 573, and p. 232, *ante.*)

23. An unstamped document, which ought to have been stamped, is admissible in evidence (except in criminal proceedings) only on payment of the stamp duty and a penalty; and the duty payable is that which would have been payable in accordance with the law in force at the time of the execution of the document. (See p. 233, *ante.*)

24. A lost or not produced document is presumed to have been duly stamped. (*Pooley* v. *Godwin*, 4 A. & E. 94.)

25. A letter expressed to be written without prejudice cannot be received in evidence either for or against the writer, nor can the reply thereto, though not expressed to be written without prejudice. (*Paddock* v. *Forrester*, 3 M. & G. 903, and see *Kurtz* v. *Spence*, 57 L. J. Ch. 238.)

26. Documents more than thirty years old prove themselves, if it be proved that they come from their proper place of custody, or from a place where they might reasonably be expected to have been found. (*R.* v. *Farringdon*, 2 T. R. 471; *Croughton* v. *Blake*, 12 M. & W. 205; *Doe* d. *Thomas* v. *Beynon*, 12 A. & E. 431.)

Handwriting.

27. Handwriting may be proved by any person who has ever seen the alleged writer write, or who has been in correspondence with him (*Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. at p. 730); or by comparison with any writing proved to be genuine. (C. L. P. Act, 1854, s. 27.)

28. Handwriting may be disproved by the evidence of persons who have made handwriting a subject of study. (*Newton* v. *Ricketts*, 9 H. L. C. 262.)

Primary Evidence of Documents.

29. As a general rule documents are provable by the production of the originals alone. (See p. 428, *ante*.)

Secondary Evidence of Documents.

30. Registers of births, marriages, and deaths, orders of the Privy Council, and a very large number of other public documents, are provable by "London Gazette," or examined copies, or in the other manner prescribed by particular statutes. (See p. 438, *ante*.)

31. A lost document is provable by a copy or by oral evidence of its contents, upon proof that it has not been found after sufficient search made. (*Gathercole* v. *Miall*, 15 M. & W. 319, and p. 433, *ante*.)

32. Secondary evidence is admissible of the contents of a document in possession of the opposite party after notice to and failure by him to produce it.

33. A witness being sworn, and having in court a document in his possession, is bound to produce it if required, though he has not received a notice to produce it. (*Dwyer* v. *Collins*, 7 Ex. 639.)

34. When once secondary evidence is admissible, any kind of secondary evidence is admissible, although a better kind may have been obtainable. (*Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102, and p. 436, *ante*.)

Relevancy.

35. Evidence must be directed and confined to the matters in issue. (See p. 252, *ante.*)

36. Evidence as to matters not in issue may be given in order to prove intent; thus upon a trial of A. for poisoning B. evidence is admissible that he has also poisoned C. (See p. 255, *ante.*)

37. Evidence of the character of parties is not admissible, except where the nature of the proceedings is to put the character in issue, or where the proceedings are criminal. (See p. 256, *ante.*)

38. In criminal proceedings evidence of the good character of the prisoner is admissible, and if given may be contradicted by evidence of bad character, or if the trial be for felony by proof of a prior conviction for felony. (6 & 7 Will. 4, c. 111, p. 260, *ante.*)

39. It is the general reputation of the party, and not the individual opinion of the witness as to his disposition, which is evidence to character. (*R.* v. *Rowton*, 34 L. J., M. C. 57, and p. 258, *ante.*)

Burden of Proof.

40. The burden of proof lies on the party who asserts the affirmative, in substance, of the question in dispute. (*Amos* v. *Hughes*, 1 M. & R. 464, and p. 269, *ante.*)

How much must be proved.

41. It is sufficient if the issues raised are proved in substance. (See p. 275, *ante.*)

Presumptions.

42. It is an irrebuttable presumption of law that an infant under seven years cannot commit felony; and that every person knows the law.

43. It is a rebuttable presumption of law that a child born during wedlock is the child of the marriage; that any person is sane or innocent; and that any person has discharged the duties cast upon him by law. (See p. 292, *ante.*)

44. Amongst presumptions of fact are the presumptions that the ordinary course of nature is observed; that a woman above a certain age will not bear children, and that no person will pay money which he knows not to be due. (See p. 300, *ante.*)

45. Special presumptions take precedence of general; *e. g.*, the presumption of innocence may be rebutted by the presumption of guilt arising from the recent possession of stolen property.

46. Presumptions derived from the course of nature are stronger than casual presumptions.

Hearsay Evidence.

47. Hearsay evidence is generally not admissible.

48. Hearsay evidence may be given of the evidence of a deceased witness at a former trial between the same parties; of matters of pedigree, and matters of general interest; of the declarations of deceased persons against their own interest, or in the regular course of business, and of dying declarations; also, on interlocutory motions. (See p. 445, *ante.*)

Opinion Evidence.

49. The opinions of witnesses are not receivable as evidence except where the identity of a person or thing is in issue, or where the witness, commonly called an "expert," has professional knowledge of the matters deposed to. (See p. 462, *ante.*)

Self-Regarding Evidence.

50. The law rejects what a man has stated on his own behalf, and admits what he has stated against himself; but where a document or statement is partly favourable and partly unfavourable to a party, the whole of it is admissible. (*Randle* v. *Blackburn*, 5 Taunt. 245, and p. 471, *ante.*)

Admissions.

51. An admission is receivable as primary evidence of the contents of a written document. (*Slatterie* v. *Pooley*, 6 M. &. W. 664, and p. 475, *ante.*)

52. The fact that a party requested a witness to give false evidence is admissible evidence against such party as being tantamount to an admission that the party has a bad case. (*Moriarty* v. *London Chatham & Dover R. Co.*, L. R., 5 Q. B. 314, and p. 475, *ante.*)

Confessions in Criminal Cases.

53. The confession of the prisoner is admissible evidence against him if freely made, otherwise not. (See p. 496, *ante.*)

Admissions in Criminal Cases.

54. Such confession as above is the only admission receivable as evidence against the defendant in criminal cases. (See p. 98, *ante.*)

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